# THE INDIAN LAW REPORTS,

## BOMBAY SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT BOMBAY, AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

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VOL. XXV.

1901.

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Published under the Authority of the Governor General in Council,

THE SUPERINTENDENT, GOVERNMENT PRESS, MADRAS;

THE SUPERINTENDENT, GOVERNMENT CENTRAL PRESS, BOMBAY;

THE CURATOR OF GOVERNMENT BOOKS, NORTH-WESTERN PROVINCES AND OUDH;

AND

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THE

# INDIAN LAW REPORTS,

## Bombay Series.

## PRIVY COUNCIL.

P. C.*
1898.
*November*
10, 11 *and* 26.

AJAB SINGH AND OTHERS, APPELLANTS, *v.* NANABHAU VALAD DHANSING RAUL, RESPONDENT.

On appeal from the High Court at Bombay.

*Documentary evidence—Old reports of panchâits—Claim to a vatan existing from Marátha rule.*

Title to an inheritance devolving upon a single heir was contested between the parties representing, respectively, two lines of descent from the same ancestor. He had three sons whose posterity continued in three lines till the extinction of the senior line of descendants in 1877. On this, the last of the younger of the two surviving lines claimed to have his right to the succession declared.

The question was whether an ancestor of the claimant had adopted as his son a member of the family born in the senior line. The decision depended on the weight to be attached to entries in old documents. These were reports by panchâits to the Collector of the years 1819—21, preserved among the Mámlátdár's records, and they related to questions of succession between the heads of the family lines, disputing then, as were their successors now. The authenticity of the reports was not impeached. But the adoption now in question could hardly have been the point then in dispute, and the entries as to it had been tampered with.

The enquiry, however, into the history of the family was minute, it took place before a competent local tribunal, and the report was signed by the plaintiff's grandfather. The findings were held strong evidence in matters of family pedigree. The decision of the High Court, which had dismissed the suit, (after bringing home the fact of the part obliteration of the entry to the plaintiff), was, on the evidence, maintained.

APPEAL from a decree (2nd December, 1890) of the High Court reversing a decree (30th November, 1887) of the Subordinate Judge of Dhulia.

*Present: LORDS HOBHOUSE, MACNAGHTEN, AND MORRIS, AND SIR R. COUCH.

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This suit for a declaration of title was brought by the father of the present appellants against the respondent, claiming to establish his right to the Rawulki vatan at Karwand, as his ancestral vatan, in táluka Shirpur, zilla Khándesh. The plaintiff alleged that he was entitled, as the nearest of the descendants from a common ancestor, Sultanji, who died in the last century, to inherit on the death of the last male holder Bhilesing, who died unmarried on the 14th September, 1877. Sultanji having had three sons, there were three lines of descent, the senior line becoming extinct on the death of Bhilesing. The plaintiff Madhavsing was sixth in descent in the third line, and Nanabhau, the defendant, was sixth in the second line. Each of these claiming to be heir next after Bhilesing, they were, before the recognition of either, referred to proceedings in the Civil Court, and, accordingly, this suit was brought on the 9th September, 1886.

The claim of Madhavsing, with the assent of both parties, turned upon the decision of a single question of fact; whether Sujansing, youngest son of Bhaba, the latter being first in the senior line, had been adopted by Futtehsing, son of Esba, in the junior line; it not being disputed that Sujan would have been thereby removed from his original branch to the other one, or that the proof of this adoption would dispose of the plaintiff's claim.

The facts are stated in their Lordships' judgment. The Subordinate Judge decided this question in favour of the plaintiff. This decision was reversed by the High Court (Sargent, C.J., and Candy, J.).

The question of the fact of the adoption was again raised on the present appeal.

Part of the judgment of the High Court was as follows:—"The parties in the present case having elected to go to trial on the sole issue whether Sujansing was adopted by Futtehsing, rely on certain old documents taken from the Mámlatdár's records. In 1818-1819 there was a dispute between Bhimsing and Nahar as to which was the senior, Bhaba or Gungba. This was referred to a panch, who in their report gave a history of the family,

holding that Bhaba was the senior. Nahar admitted the fact, and gave a "*khotpatra*" to that effect.

"In 1821-1822 there was a dispute between Bhimsing and his son Udesing on the one side, and Nahar's son Devising on the other, as to Devising's alleged adoption by Durjan's widow Baijabai. This matter was referred to a panch, who in their report gave a history of the family, holding Devising's adoption proved. This was confirmed by a judicial decision.

"The present defendant, on whom the onus primarily lies, asserts that the fact of Sujan's adoption by Futtehsing was incidentally mentioned in these documents, and that plaintiff has tampered with these documents, and endeavoured to remove all trace of the mention therein of the adoption. If defendant can make good his contention, then there is a presumption that Sujansing was really adopted by Futtehsing. The only person whose object it could have been to remove the mention of the fact of the adoption from the documents is the plaintiff, and his object must have been to conceal the fact. If the fraud is brought home to him, it may be inferred that, as a fact, Sujan was adopted by Futtehsing, and plaintiff is not entitled to any assistance from the Court in asserting his title to be considered the senior representative of the family. Inspection of the report of the panch in 1819 shows that words reciting Sujan's adoption were originally written in the document. This fact cannot be denied by plaintiff, for whom, however, it is contended that the words were deleted at the time when the document was drawn up. This is extremely improbable, as there is no trace of any signature or endorsement attesting the deletion, which is made with ashes or some such substance mixed with ink, the object apparently being to entirely obliterate as far as possible the words in question. They cannot now be read without the paper being held up against the light. In one portion the smudge has entirely concealed the former writing.

"But it can be shown that the deletion must have been made, not in 1818, but between 1878 and 1883."

On a strict examination it was made clear that this was the case; that the recital of the adoption existed when the docu-

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ments were signed, and that the attempted fraud was the plaintiff's, not the defendant's.

The claim was dismissed with costs.

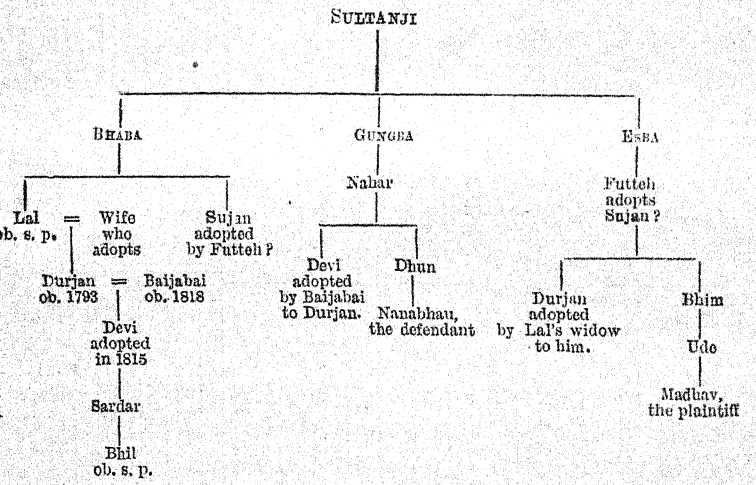
On this appeal *A. Phillips*, for the appellants, argued that the evidence was sufficient to support their claim. The burden of proof had been rightly laid on the defendant, but there was error in the finding that it had been discharged. The respondent had not proved that Gungba was senior to Esba, or that Sujansing was adopted by Futtehsing.

*J. D. Mayne*, for the respondent, submitted that the High Court was right in finding that the adoption of Sujansing was established.

*A. Phillips* replied.

Afterwards, on the 26th November, their Lordships' judgment was delivered by

LORD HOBHOUSE:—The question in this case is most readily explained by means of a pedigree; and one is annexed which has been extracted from those in the Record, with the omission of some unnecessary names—




It shows that from the common ancestor of the parties there have descended three lines of issue; that the senior line, that of Bhaba, is extinct; that the defendant belongs to the second line, that of Gungba; and the plaintiff to the third, that of Esba.

Plaintiff and defendant each claim to be heir-at-law of Bhil, or adding his honorary suffix Bhilesing, the last owner of the property in dispute. The plaintiff is the lineal descendant of Sujan who was born into the senior line. The pedigree shows that he was adopted into the third line. The plaintiff denies that, and the question in this appeal is whether or no the adoption was made. The Subordinate Judge determined that issue in favour of the plaintiff, and the High Court in favour of the defendant. The plaintiff has appealed, and the present appellants are his heirs.

In opening the case Mr. Phillips submitted another question, *viz.*, whether the line of Esba is not senior to that of Gungba, so that Sujan's descendant would still be heir even if he had been adopted into Esba's line. The contents of this Record do not favour such a supposition. But their Lordships are clear that the plaintiff never raised the question in the Courts below. The plaint says nothing about it; neither do the settled issues; the Subordinate Judge does not address himself to it; and the High Court says expressly that the only question is the adoption of Sujan on proof of which the plaintiff's case must fail.

The property in dispute is somewhat peculiar in its nature. It is an interest in lands granted by the Marátha ruler of the country, whether Holkar or the Peishwa, to the Rawal family for military services. The lands are part of the territory which was conquered or acquired by the first ruling Holkar, and which passed to the East India Company in January, 1818, by the Treaty of Mundisore. The interests not granted to the Rawals were vested in the Sirkár or ruler and have passed to the Secretary of State in Council. Since the death of Bhil the whole property has been in the hands of the Collector, and this suit is not for possession but for declaration of title. The property is clearly one which descends to a single heir by the rules of primogeniture. Apparently the incidents of title are such as are usual in this kind of tenure, but it has not been necessary to travel minutely into such matters, because all things material to the present question have been the subject of express findings in the course of legal proceedings.

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In the year 1793 Durjan died without issue, leaving Baijabai his widow. At that time the reigning Holkar was a lady whose variously spelt name may be designated as Ahilya Bai. She was the widow of the son of the first Holkar conqueror, and after his death she assumed the government and carried it on with marked ability and success for thirty years. Notice of Durjan's death was given to her by Baijabai according to the custom in such cases, and apparently because of her double capacity as Sirkár and as joint-owner. Ahilya Bai's answer runs as follows :—

"From your friend Ahilya Bai Holkar Raul, tarf aforesaid, salutations. The Sur year one thousand two hundred and ninety-three (A. C. 1792-93). I have received the letter which you sent and have noted the contents. You wrote to say that Durjansing Raul had been ailing and that the medicines tried (on him) proved ineffectual and that he died, that God willed it so, and that could not be helped, and prayed that an *abhayapatra* might be sent in the name of his full brother Bhimaji Raul. As to that, Durjansing died; God's will be done. I have sent a separate *abhayapatra* in the name of his brother. Should the bhaubands (kinsmen), &c., take objections (to the same), do you issue strict (peremptory) orders. Be this known."

The lunar dates of writing and receipt have been destroyed by white ants, but it is shown that the letter passed some time in 1793.

Bhim was accordingly placed in the management, and in the year 1805, upon some complaint by him of disturbance on the part of Nahar, the then reigning Holkar Yeshwant Rao confirmed his position. Mr. Phillips has argued from the language of these orders that Bhim became the owner of the property. There is nothing in the language to denote that he was made owner, though doubtless management carried some emolument with it, and was a coveted position; but it is not worth while to examine closely into the question what kind of interest was conferred on Bhim, because it is quite clear that his position, whatever it may have been, was one liable to be displaced by the adoption of a son to Durjan. It is certain, however, that he continued to be manager for some years.

Not long after the death of Ahilya Bai the Marátha States became a prey to violent disorders which lasted many years. In Holkar's own dominions civil war broke out; complicated strifes arose between him and others of the great Marátha families,

the Peishwa, the Gáekwár and Scindia, and between them all and the Company. The villages belonging to this property were devastated. Bhim fled away. Nahar assumed the task of re settling and managing the lands. In that state were affairs in 1815 when Baijabai adopted Nahar's son Devi to be son of Durjan.

Some time afterwards it appears that Baijabai repented of her adoption and inclined to Bhim's branch of the family. The adoption of Devi, however, could not be, or at all events never was, undone. But about the time of Baijabai's death in 1818, Bhim made attempts to dispute the title of Devi or the management of Nahar, and these attempts led to proceedings which furnish the proof of Sujan's adoption by Futteh. The dispute was referred for enquiry to a panchâit, whose report dated 7th February, 1819, will be found in Exhibit No. 73. After stating the family pedigree down to the brothers Lal and Sujan the report continues:—

"Of these the elder Raul, Lalsing, had enjoyment of the kárbhár (management) till his death. Sujansing (*b*) was taken in adoption by Yesba's son Futtehsing (*b*), a minor (*c*)."

The references (*b*) and (*c*) are to the subjoined remarks made in the Record.

"(*b*) The equivalents of the words 'Was taken in adoption by Yesba's son Futtehsing' have been deleted, and the deletion appears to have been made with ashes or some such substance mixed with ink, the object being to entirely obliterate the words in question."

"(*c*) An interlineation in the original."

Both the disputants Bhim and Nahar signed the report, or memorandum as it is called in the translation; each saying that he agreed to what is stated in it.

It does not appear whether any formal order was made on this report, and there is not in the Record any order of reference or formal statement of the case to show what was the precise subject of decision. But the report was filed and preserved in the Collector's office from whence it is now produced. The adoption of Sujan could, it is true, hardly have been the point in dispute at this time. But it is clear that a minute local enquiry into the history of the family from Sultanji downwards took place before

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a competent local tribunal; and their findings are strong evidence in matters of family pedigree. When it is added that the parties to the dispute were the heads of the two family lines that are now disputing; that Bhim could not have been insensible to the importance of keeping himself, if he could, in the senior line; and that he signed the report; its evidence against him is conclusive unless he can bring some counter-evidence to contradict or invalidate it.

The Subordinate Judge appears to have treated the report very lightly because it has been tampered with. But its original wording though smudged is decipherable, and there is no dispute but that it ran as above quoted, except possibly as regards the interlineation, which is not material. If the original words of the panch can be known with certainty, a subsequent attempt to destroy some of them cannot do away with their effect. The plaintiff's counsel at this bar has taken a different line of argument. He submits that the smudged words were so treated by the panch themselves and represent their final opinion before the report was signed. This suggestion is pure conjecture, it rests on no evidence, and it is to the highest degree improbable. The suggestion is that the draft report must have been found erroneous in a point important enough to call for alteration, that the alteration was effected by some ineffectual smudging, that in that state it was signed by the seven members of the panchâit, by nine witnesses and by the contending parties, and yet that nobody thought of affixing any note or mark to indicate that any alteration had been made. That is incredible.

Moreover, if the words in question are removed, what remains is nonsense. Either the word "Sujansing" alone remains, or if the interlineation be accepted "Sujansing a minor." Neither has any meaning at all. Their Lordships hold that the suggestion now made for the plaintiff is without weight, and that the report must be read as originally written. It is sufficient to prove the adoption of Sujan by Futteh.

There was a further reference to another panch on the question whether Devi had been adopted. They reported in the year 1822, and on their report the Collector's Court found that Devi had been adopted, and decreed that he should carry on the

management. In point of fact, after Devi's adoption he or his son and grandson have been in possession. But the records of the second panch, introducing as they do an assertion of Sujan's adoption, have had tricks played upon them very similar to those played upon the records of the first panch. The second panch indeed supports the first. But such support is not necessary, and as there is no suggestion that the proceedings in 1822 contradict those of 1819 or in any way impair their force, their Lordships do not now go into detail about them.

The learned Judges of the High Court have subjected Exhibit 73 and the several copies or duplicates connected with it to a rigorous examination with the view of finding out when it was tampered with and how. They conclude that it was done between the years 1878 and 1883 in the interest of the plaintiff. They show strong grounds for this opinion, and the plaintiff's counsel, though he disputes their inference and suggests another explanation of the condition in which No. 73 is found, has not challenged any of the statements on which the learned Judges found their inference. It can hardly be doubted that they are right, or that there is strong suspicion of fraud by the plaintiff. A similar result has followed an examination of the documents relating to the proceedings of 1822. Their Lordships, however, again refrain from going into details in either case on this occasion because in any view the authenticity of No. 73 as stated in the record is unimpeached, and that is sufficient to prove the defendant's point.

The plaintiff has failed to prove his title, and their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellants must pay the costs.

*Appeal dismissed.*

Solicitors for the appellant:—Messrs. *Crouch, Edwards, and Heron.*

Solicitors for the respondent:—Messrs. *T. L. Wilson and Co.*

# ORIGINAL CIVIL.

*Before Mr. Justice Crowe, and on appeal before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Russell.*

1900. *August* 18, 25.

VULLEY MAHOMED AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* DATTUBHOY HASSAM AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Award—Ground for setting aside an award—Specific Relief Act (I of 1877), Ch. V, Sec. 39—Exercise of Court's discretion—Conduct of plaintiffs—Reasonable apprehension of injury—Coercion.*

The plaintiffs and defendants together with one Jaffer Gangji, who died before the date of this suit, entered into a partnership in February, 1895, to do certain work for the Mahárája Holkar at Indore. The work was done and paid for, whereupon disputes arose among the partners as to the allocation of the payments. Criminal proceedings were instituted at Indore by the first and the third defendants and the fourth plaintiff Cooverji against the first and second plaintiffs, who were arrested under warrants on the 20th June, 1895. They were subsequently released on bail, and while the proceedings against them were still pending, the matters in dispute between the plaintiffs and the defendants were referred to arbitration on the 9th September, 1895, and an award made on the 17th September, 1895. The submission paper and the award were signed by all the parties except the fourth plaintiff Cooverji. The criminal proceedings at Indore were then withdrawn.

On the 21st June, 1898, the first and second defendants filed a suit against the first three plaintiffs in the Court at Indore to recover from them the amount due under the award, but on the 7th July following the plaintiffs (four in number) filed this suit to have the award declared null and void and for an injunction against the defendants Nos. 1 and 2 restraining them from proceeding with their suit at Indore.

The lower Court held that the allegations of collusion and fraud made by the plaintiffs were false, but held that the award was not binding on any of the parties, inasmuch as the fourth plaintiff (Cooverji) had not signed the submission paper.

In appeal the Court agreed with the lower Court as to the allegations of collusion and fraud, but, without expressing any opinion on the question whether the award was rendered invalid by reason of the fact that the fourth plaintiff (Cooverji) had not signed the submission paper, their Lordships reversed the decree and dismissed the suit on the ground that no case had been made out by

* Suit No. 306 of 1898; Appeal No. 1063.

the plaintiffs for the special intervention of the Court under Chapter V of the Specific Relief Act (I of 1877). The plaintiffs had not shown that they had reasonable apprehension that the award if left outstanding would cause them serious injury, nor had their conduct been such as to call for an exercise of the Court's discretion under section 39 of the Act in their favour.

Per JENKINS, C. J.:—In a suit of this nature, three points must be made good by the plaintiffs: (1) that the award is void or voidable; (2) that the plaintiffs have a reasonable apprehension that such instrument if left outstanding may cause them serious injury; (3) that the Court ought, under the circumstances of the case, in the exercise of its discretion to adjudge the award void or voidable and order it to be delivered up and cancelled.

*Antram* v. *Chace*(1) discussed and distinguished.

SUIT to have an award declared null and void.

The plaintiffs and defendants together with one Jaffer Gangji, who had died before the date of this suit, entered into a partnership in February, 1895, to do certain work for the Mahárája Holkar at Indore. The work was done and paid for, whereupon disputes arose among the partners as to the allocation of the payments. Criminal proceedings were instituted at Indore by the first and the third defendants, and the fourth plaintiff (Cooverji) against the first and second plaintiffs, who were arrested under warrants on the 20th June, 1895. They were subsequently released on bail, and, while the proceedings against them were still pending, the matters in dispute between the plaintiffs and the defendants were referred to arbitration on the 9th September, 1895, and an award made on the 17th September, 1895. The submission paper and the award were signed by all the parties except the fourth plaintiff (Cooverji). The criminal proceedings at Indore were then withdrawn.

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(1) (1812) 15 East, 209.

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The plaint alleged that the defendants "put pressure" on the first and second plaintiffs to get them to consent to the arbitration, the criminal proceedings against them being then pending; and it alleged that the award was made fraudulently and in collusion with the defendants. At the hearing the plaintiffs also relied on the fact that the fourth plaintiff (Cooverji) had not signed the submission paper or the award. The lower Court held that the award was bad because the fourth plaintiff (Cooverji) had not signed the reference, but found that there had been no fraud or intimidation by the defendants. The following judgment was delivered:—

CROWE, J. (having found on the evidence that there was no fraud or intimidation as alleged by the plaintiffs continued):—

The conduct of the plaintiffs themselves affords support to the defendants' case. Admitting for a moment that they had not been present when the award was made, and had not ratified it and signed it, the first steps they would have taken when the prosecution was withdrawn would have been to revoke the submission on the ground that it had been extracted from them by threats or undue pressure. Even if the award was not made on the date alleged, they must have known that it would be promulgated shortly, yet so far from seeking to avoid their act, they paid one or two visits to the arbitrators to ascertain how they were getting on with the award and what was being done, and this after the criminal proceedings were stayed and all pressure was removed. The evidence shows that they acted freely and voluntarily, and not under intimidation; that the agreement come to between the parties was a perfectly reasonable one and was the best possible arrangement for the parties, and that plaintiffs did attend the meetings of the arbitrators while the preparation of the award was proceeding. The cases cited by the learned counsel for the plaintiffs in support of the argument that the contract was void on account of undue pressure—*Nicholls* v. *Nicholls*[1]; *Scott* v. *Scott*[2]—are none of them on all fours with the present case. No case goes so far as to say that a party who is being criminally prosecuted may not of his own free will agree to refer the matter in dispute to

(1) (1737) 1 Atkins, 409. (2) (1846-47) 11 Ir. Eq. Rep., 74.

civil arbitration, or that in such circumstances he is not a free and voluntary agent. In this connection the observations in Kerr on Fraud and Mistake (2nd Ed.), page 334, are in point. The author observes: "But as soon as a man with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time, and knowingly and deliberately permits another to deal with the property, or incur expense, under the belief that the transaction has been recognised, or freely or advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction, although orginally impeachable, becomes unimpeachable in equity."

I come now to the last point in the case, which is comprised in the sixth and seventh issues, whether the agreement and award are binding on the plaintiffs having regard to the fact that the said agreement is not signed by all the parties. It is admitted that the fourth plaintiff Cooverji has not signed the submission, nor, if reliance is to be placed on the 4th paragraph of the written statements of the first and second defendants, has the third defendant. The defendants there state distinctly that the two reference papers were signed on the 9th September, 1895. The other parties to the original partnership agreement (*viz*, the fourth plaintiff and the third defendant) having before this withdrawn from the matter as having little or no interest in it. It was contended by defendants in the course of these proceedings that Exhibit 15 was signed by Ghulam Husen Somji on behalf of all the defendants under a power-of-attorney, but that power-of-attorney has never been produced. Many cases have been cited to show that a reference to arbitration which is not signed by all partners is invalid. The case of *Strangford* v. *Green*[1] was relied on to show that the partner submitting would be bound, but his partner who had not submitted would not. That, however, was a case between a partnership and an outsider, and not, as in the present, where the affairs and matters in difference

(1) (1677) 2 Mod., 228.

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between the partners *inter se* were referred. The authority which appears to me to govern the case is to be found in the decision in *Stead* v. *Salt*[1], where it was held that one of several partners cannot bind the others by a submission to arbitration even of matters arising out of the business of the firm, and also that entering into submission to arbitration is no part of the ordinary business of a trading firm. This was the case of special partnership, but in *Adams* v. *Bankart*[2] a similar conclusion was arrived at; Lord Abinger remarking that *Stead* v. *Salt*[3] was in point, as there was no distinction between a general partnership and one in a particular transaction. The decision in *Antram* v. *Chace*[4] is entirely in point. The principle underlying the decision is clearly and tersely put by Lord Ellenborough, C.J. He says: "This was a reference of the aggregate accounts between all and each of these partners, and the consideration to each for entering into the submission was that each party's account should be liquidated not only as to one but as to all . . . . and they mutually stipulated with each other that the arbitrators should liquidate not only partnership accounts but also separate accounts between any two of them. Now here the arbitrators were not shown to be armed with authority to decide the whole question between the parties * * * The principle is so strong that it wants no authority to support it, that there should be the accession of all the parties to the common agreement of all, which is the consideration to each for entering into the agreement." Now there can be no doubt that the arbitrators have proceeded to settle all the affairs in dispute between the partners. The terms of the award are quite clear on that point. All the partners are mentioned. They say we have examined the books of account, documents, &c., in relation to the disputes as to accounts of you the partners and give our award "which you all must acknowledge as the Court's final decision, and you all must act as it is written in the award." It was further held in *Adams* v. *Bankart*[5] that one partner cannot bind another by a submission to arbitration without the assent of

(1) (1825) 3 Bing., 101.
(2) (1835) 1 C. M. and R., 681.
(3) (1825) 3 Bing., 101.
(4) (1812) 15 East, 209.
(5) (1835) 1 C. M. and R., 681.

the latter, not necessarily in any particular form of words. There must be some evidence of actual authority conferred, and such power cannot be inferred from the relation of partnership. The signature on the reference of Virji is stated to be for Jaffer, Nurali, Virji & Co. Now although no evidence is produced to show that Virji was authorized to sign in behalf of his partners, I think the fact that both Jaffer and Nurali did attend the meetings of the arbitrators must be taken as evidence of an implied authority on their part and a ratification of what was done, and the same remark applies to his signature in the same form in the award. So also the award purports to be signed by Yusuf Ali Mahomed for Abdulla Yusuf Ali Mahomed; and defendant No. 3, who is alleged to be the actual partner, does not seek to repudiate the award. The same, however, cannot be said as regards the other partner Cooverji. He says distinctly he was not asked to join in the reference to arbitration when it was made, but long time after when he refused to sign as he said he did not know the arbitrators and had not seen them. He says he has not withdrawn from the partnership, and that he asked on what ground the award had been made against him, as he had not signed the reference paper. In this condition of things it seems quite clear that in the absence of Cooverji's signature the arbitrators were not armed with authority to decide the matters in dispute, that Cooverji cannot be held bound by the award, and, therefore, it must be held null and void as far as the other partners are concerned. With regard to the question of costs, it is quite clear that the costs have been largely increased by reason of the false case set up by plaintiffs. I order, therefore, that the costs, as far as the third and fifth issues are concerned, be borne by the plaintiffs. The third defendant to pay his own costs. The rest of the costs to be borne by defendants Nos. 1 and 2. Delivered on the 14th September, 1899.

The defendants filed an appeal against so much of this judgment as was adverse to them, and the plaintiffs filed cross-objections.

*Robertson* with him *Rivett-Carnac*, for appellants.

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*Starling* and *Raikes*, for respondents.

JENKINS, C. J.:—On the 25th February, 1895, the plaintiffs and defendants together with Jaffer Gangji (who has since died) entered into a partnership agreement, having for its purpose the undertaking and completion of certain illumination works at Indore on the occasion of a marriage in the family of His Highness the Holkar. This agreement was reduced into writing and is Exhibit I in the case. The contemplated work was duly completed, but disputes arose which resulted in a reference of them to arbitration. An award was made, and on the 27th June, 1898, a suit was instituted at Indore by the defendants Vulley Mahomed Rahimtulla and Ibrahim Rahimtulla against the first three plaintiffs to recover a sum of Rs. 4,799-0-9 on the basis of this award. Thereupon the present suit was commenced, whereby the plaintiffs pray, first, that it may be declared that the award is not binding upon the plaintiffs and is null and void, and, secondly, that the first and second defendants may be restrained by the order and injunction of this Honourable Court from proceeding with the suit in the Court at Indore. The material allegations on which the right to this relief is based, are set forth in paragraphs 5, 7, 11 and 13 of the plaint as follows :—

"5. After the said contract had been carried out, disputes arose between the partners, and the said defendants taking undue advantage of the then temporary residence at Indore of the first and second plaintiffs falsely and maliciously adopted criminal proceedings at that place against the first and second plaintiffs and got them arrested under warrants. This was done in the month of June, 1895. The said plaintiffs got themselves released on bail. While the said criminal proceedings were pending, the defendants put pressure upon the said first and second plaintiffs and got them to consent to refer the matters in dispute to the arbitration of Ghulam Husen Sumar Vira and Fazal Mahomed Raiji. Accordingly a reference paper was drawn up in Bombay and the first and second plaintiffs signed the same at Bombay on the 9th day of September, 1895. The said arbitrators on the same day produced to the first and second plaintiffs a blank stamped paper and asked them to put their signatures at the foot thereof, telling the said plaintiffs that they, the arbitrators, would require the said paper for the purposes of the arbitration, and the first and second plaintiffs put their signatures to the said paper as requested. It was expressly agreed at the time the said reference paper was signed by the first and second plaintiffs that the same should not be of any effect unless it was signed by all the partners in the said partnership business. A copy translation of the said reference paper is hereunto annexed and marked B."

"7. The plaintiffs say that the said reference paper was not signed by any of the other partners, and the reference, therefore, fell through."

"11. The plaintiffs say that the said award was made in collusion with the defendants and is not binding upon the plaintiffs."

"13. The first and second defendants with a view to annoy the first three plaintiffs recently (that is, on the 27th of June last) filed a suit against the said plaintiffs in the Court of the Civil Judge, Residency Indore, (being Suit No. 4 of 1898 of the said Court) to recover a sum of Rs. 4,799 and pies nine relying and founding their claim upon the said award. To the plaint in the said suit, the said defendants have annexed a document purporting to be a copy of a reference paper alleged to have been signed on their behalf and on behalf of the said Abdulla Yusuf Ali Mahomed by one Ghulam Husen Somji authorizing the said arbitrators to do certain matters in connection with the said reference. The plaintiffs say that the said document, if any, was prepared fraudulently and in collusion with the said arbitrators and it is in no way binding on the said defendants to the said reference. A copy translation of the said document is hereunto annexed and marked D."

A written statement was put in, and in due course the case came on for hearing before Mr. Justice Crowe, when the following issues were settled:—

1. Whether this Court has jurisdiction to try this suit, having regard to section 12 of the Civil Procedure Code.

2. Whether, if so, the Official Assignee is not a necessary party to the suit as representing the fourth plaintiff.

3. Whether the first and second plaintiffs, at the request of the arbitrators, put their signatures at the foot of a blank stamped paper on the 9th September, 1895, or 17th September, 1895, as in paragraph 5 of the plaint alleged.

4. Whether it was expressly agreed, at the time the reference paper was signed, that it should not be of any effect unless signed by all the partners as in paragraph 5 of plaint alleged.

5. Whether the award in the plaint mentioned was written on stamped paper signed in blank by plaintiffs Nos. 1 and 2 on the 9th or 17th September, 1895, as alleged.

6. Whether the award in the plaint mentioned is not valid and binding on plaintiffs or any and which of them.

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At request of plaintiffs' counsel—

7. Whether, in the event of issue 4 being decided against plaintiffs, the agreement to refer and the award are binding on plaintiffs having regard to the fact that the said agreement is not signed by all the partners.

Evidence was adduced on both sides and, when the case was closed, a considered judgment was delivered by Mr. Justice Crowe, in the course of which he decided adversely to the plaintiffs on all the points raised before him except as to the legal consequences resulting from the absence of Cooverji's signature to the agreement of reference. This omission, he held, invalidated the award and entitled the plaintiffs to the declaration they sought in the first paragraph of the prayer to their plaint.

From this decree the defendants have appealed and, while relying on the findings of the lower Court in their favour, they have combated Mr. Justice Crowe's conclusion as to the consequences that should flow from the fact that Cooverji did not sign the agreement of reference.

The respondents on the other hand have sought to support Mr. Justice Crowe's decree, not only on the point he decided in their favour, but also by endeavouring to establish before us those allegations which the learned Judge held to be not proved.

Though the plaintiffs prayed for an injunction restraining the first and second defendants from proceeding with the suit in the Indore Court, that relief was not granted: the decree simply declared that the award was not binding upon the plaintiffs, and that the same was null and void. Presumably this relief was decreed under the powers vested in the Court by Chapter V of the Specific Relief Act (I of 1877) which treats of the cancellation of instruments. Section 39, which is the leading section of that chapter, provides in paragraph 1: "Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled."

Three points, therefore, must be made good by the plaintiffs: 1st, that the award is void or voidable; 2ndly, that they have

reasonable apprehension that such instrument if left outstanding may cause them serious injury; and 3rdly, that the Court ought under the circumstances of this case in the exercise of its discretion to adjudge the award void or voidable and order it to be delivered up and cancelled.

It is not enough that the award may be void or voidable; the other points must also be established. This aspect of the case, however, does not seem to have been clearly presented to the first Court, for I find no reference to it in the judgment.

Now three grounds have been suggested to us as rendering the award void. 1st, that the reference on which it is based was the result of coercion exercised by the defendants on the plaintiffs other than the fourth; 2ndly, that the consideration for the agreement was unlawful, as being opposed to public policy, for it was a promise to drop a prosecution; and 3rdly, that the absence of Cooverji's signature was contrary, if not to the agreement of the parties, at any rate to the expectation and belief under which the reference was signed by or on behalf of the first three plaintiffs.

Neither the first or the second of these points is raised directly in the issues, so that Mr. Starling, to justify himself in bringing them to our notice, had to rely on the sixth issue. Now it is difficult to suppose that it was intended by the sixth issue to enable these points to be raised because it was suggested by counsel for the defendants, and it is not, as a rule, the object of counsel to suggest an issue whose purpose is to enable his opponent to make a point not otherwise open to him. From the very general form in which the issues have been framed, we are in this unsatisfactory position that we cannot tell whether or not the plea of coercion, as distinct from some vague and shadowy generalities as to pressure, was ever really presented to the first Court.

When we are confronted with a plea of coercion, we have a clear and distinct idea of what we are dealing with; when we are appealed to on the ground of pressure, we are invited to wander, I know not where. I say this, because the Contract Act tells us clearly what is coercion and what are its results: of pressure it says nothing; and it is by the Contract Act, that in this country questions of this kind must be determined, not by the case

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law of England. Free consent is the essential basis of all contracts, and consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake—Contract Act, section 14. Of these vitiating circumstances, we are in this case only concerned with coercion, which is defined to be "the committing, or threatening to commit, any act forbidden by the Indian Penal Code or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement." Now the only act that Mr. Starling could suggest amounted to coercion was, the institution of criminal proceedings at Indore, and this, he argued, was coercion as being forbidden by section 211 of the Indian Penal Code, which provides that (His Lordship then read the section and proceeded:—)

While it cannot be said that the sixth issue is not capable of including the plea of coercion, yet it has to be conceded that section 211 of the Penal Code was not so much as referred to, nor can I find even any trace of allusion to section 14 of the Contract Act.

How can we under these circumstances pay any serious consideration to criticisms based on the absence of evidence relevant to a point which can hardly be said to have been alluded to in the course of the proceedings. As a matter of fact Mr. Justice Crowe has held that the first three plaintiffs "acted freely and voluntarily and not under intimidation, and that the agreement come to between the parties was a perfectly reasonable one and was the best possible arrangement for the parties." That conclusion was based on the oral evidence given before Mr. Justice Crowe, as a result of which he considered not merely that the plaintiffs had failed to make out their case, but that the testimony of the defendants' witnesses was to be preferred. I entirely accept that conclusion, and with that the plea of coercion may be brushed aside.

Then I come to the plea that the consideration for the submission was unlawful as opposed to public policy. It was not until the argument before us that this point has even been suggested,

and it might be grave injustice if we were to allow a point of this character to be raised, when from the absence of any allusion to it in the lower Court, no evidence relevant to it was adduced. I, therefore, think this point is not now open to the plaintiffs.

This brings me to the last ground on which it has been argued that the award should be adjudged void,—the absence of Cooverji's signature.

Now it must, at the outset, be conceded that Cooverji is not bound by the award, but it is at the same time equally clear that the defendants have never attempted to treat him as bound, or even suggested that this was the result of the award, for it must be recollected that he is no party to the Indore suit.

It will be convenient to deal with Cooverji first, for, though great store was evidently placed on his coming forward as a plaintiff, it will not, I think, be difficult to eliminate him and his grievance from consideration. The first question I ask myself is "Had Cooverji ever any reasonable apprehension that the award, if left outstanding, might cause him serious injury"? We do not find that hot haste or anxiety on his part which one might have expected this reasonable apprehension to inspire. He had no taste apparently for the worries of a law suit. "Duttu," he tells the Court, "has guaranteed my costs. It is not in writing. Till he did so I refused to be a party plaintiff." And why should it have been otherwise? If one may hazard a guess, his insolvency in August is suggestive of a financial position in July, the date of the suit's commencement, which robbed a threatened litigation of its terrors, and events have justified the absence of apprehension on his part: he never has been sued, and between him and his liability there now rise up the two formidable obstacles of his own insolvency and the bar of limitation. Cooverji has not occupied a prominent place in the argument before us, and I think I may without injustice to him deal for the future with the case without further thought for his imputed apprehensions.

But, then, how stands it with his three co-plaintiffs, whom I will hereafter speak of as the plaintiffs.

A perusal of the evidence does not point to any reluctance on their part to assert on oath all that appeared suitable to their

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case; but it is to their credit that they nowhere allege the existence of any reasonable apprehension on their part except as to the suit in Indore. And in this they, like Cooverji, judged aright, as events have proved. But what reason is there to apprehend that this Indore suit might cause these plaintiffs serious injury? None that I can see; for it is not pretended that the Court there is not as competent to do full justice to these plaintiffs' pleas as this Court is. I may, in passing, remark that the apprehension which possessed these plaintiffs of the injury that might accrue if the award was left outstanding, did not suggest to them that they should ask for an order that it be delivered up and cancelled.

But, apart from this, what are the facts on which the plaintiffs rely as entitling them to the favourable consideration of this Court and as demanding that we in the exercise of our discretion should interfere? Now in their plaint they did not hesitate, not only to charge collusion against the defendants, but also to assert that the award "was prepared fraudulently and in collusion with the arbitrators." Mr. Starling refrained, most properly I think, from any attempt to substantiate these serious allegations. We may, therefore, pass over this charge of fraud, though, in view of the readiness with which it is sometimes charged, I must allude to the disfavour with which the Court regards a groundless charge of this class. Though such a charge may not disentitle the plaintiffs to the Court's assistance when independent grounds of relief are alleged, still it cannot be too clearly understood that it may properly attach the penalty of costs.

Leaving fraud, then, out of the question, what has the plaintiffs' conduct been? Nurali was present when Ghulam Husen Sumar was asked to act as arbitrator; Dattu and Virji both actually signed the submission paper, Virji purporting to sign on behalf of his firm of which Nurali was a member (whether Nurali was present on the occasion is not clear). Dattu and Virji both attended the arbitrators between the signing of the reference paper on the 9th September and the making up of the award on the 17th September, 1895; they both signed the document, stating that they had read the award and agreed to the same, and bound themselves to act in accordance therewith, Virji again purport-

ing to act on behalf of his firm and this time doing so in the presence of Nurali: they never raised any objection to the proceedings while they were pending, or to the award when it was made, but they now turn round and say they are not bound. Is that conduct entitling the plaintiffs to claim favourable consideration? Clearly not. These plaintiffs, however, seek to explain away the signature of the agreement to be bound by the award by asserting that the arbitrators produced to them a blank paper, telling them that they, the arbitrators, would require the paper for the purposes of the arbitration, and that thereupon they, the plaintiffs Nos. 1 and 2, put their signatures to the paper as requested. Mr. Justice Crowe has declined to believe this story, and I fully agree with him and with the reasons he advances in support of his conclusions. (His Lordship then having gone through the evidence on the point continued:—) Then plaintiffs say it was expressly agreed at the time the reference paper was signed that it should not be of any effect unless signed by all the parties. (His Lordship went through the evidence on this point also and continued:—) Here again I wholly agree with Mr. Justice Crowe as to the inference to be drawn from the evidence, and I hold that the plaintiffs have failed to make out the agreement they allege.

So then the enquiry is narrowed down to this: Can these plaintiffs claim the aid of the Court merely because Cooverji is not bound by the award? When the exercise of the Court's discretion under Chapter V of the Specific Relief Act (I of 1877) is invoked, it is obviously material to see whether the plaintiffs have acted with promptness, whether any delay on their part has altered the position of the defendants, as well as to consider what is the nature of their claim, a point with which I have already dealt.

Now until they launched this suit on the 7th of July, 1898, nearly two years and ten months after the making of the award, no suggestion is to be found of any objection to it. It is true the Limitation Act allows three years within which to bring this suit, but as against this it has to be remembered it is at least probable that the time they have allowed to elapse would bar any remedy the defendants would have apart from the award.

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What, too, can one think of the plaintiffs' assertion that they expected Cooverji to sign the reference? How is that to be reconciled with the absence of Cooverji's name from their submission paper with their having proceeded with the reference in his absence without one word of protest, complaint or even of suggestion and with their subsequent signature of the confirmation? Mr. Starling tried to make a certain amount of capital out of the fact that Cooverji's name is mentioned in the award. But he felt he was on dangerous ground: he could not suggest that this fact influenced his clients' views, because they have sworn they did not see the award when they signed. No doubt this is believed neither by Mr. Justice Crowe nor by us, but it would have been difficult to urge an agreement so absolutely inconsistent with the plaintiffs' sworn evidence. All that Mr. Starling could make of the fact was that it showed the arbitrators understood that Cooverji's concurrence was an essential condition of these plaintiffs' assent. But against this we have the positive testimony of the arbitrators.

I have gone at length into these matters for the purpose of seeing what the plaintiffs' conduct has been, but in the view I take it becomes unnecessary to decide as to whether or not the objection to the award urged by the plaintiffs is good; for I hold that in the exercise of its discretion this Court ought not to award the plaintiffs the relief they seek. I fully recognise that this Court will not lightly interfere with an exercise by the first Court of its discretion; but in this case we in no way impinge on this rule. It is clear from his judgment that Mr. Justice Crowe never looked at the case from this point of view: he simply held that the legal objection to the award was good and he apparently thought that the relief followed as a matter of course: he never exercised his discretion in the matter.

I refrain from deciding as to the validity of this objection based on the fact that Cooverji is not bound, because I am anxious in no way to embarrass the Indore Court by any view of mine; and as we neither affirm nor overrule Mr. Justice Crowe's decision on this point the Indore Court need feel in no way hampered by anything that has been determined in this High Court. I will only

say this that I cannot agree with the view expressed by Mr. Justice Crowe that *Antram* v. *Chace* [1] is entirely in point, because there the deed of reference purported to have been made between all the partners though it was only executed by two of them. What was there held was, that as the consideration to each to execute his own submission was the submission of all the others, and as all had not executed, there was a failure of the consideration, and as a result the arbitrators had no authority. But here the defendants' contention is that it was no part of the consideration that Cooverji should be a party to the reference, and, if that be established clearly, the principle enuntiated in that case has no application. I will say no more: the question between the parties when its exact limits are ascertained is a very simple one, and I do not imagine the Indore Court will find any difficulty in dealing with it.

But, so far as we are concerned, it is enough to say that no case has been made out for our special intervention under Chapter V of the Specific Relief Act. The plaintiffs have not shown that they had reasonable apprehension that the award if left outstanding will cause them serious injury, nor has their conduct been such as to call for an exercise of our discretion under section 39 of the Act in their favour.

The appeal, therefore, must be allowed: the decree of Mr. Justice Crowe must be reversed, and the respondents must pay the appellants' costs.

Attorneys for plaintiffs :—Messrs. *Ardesir, Hormusji and Dinsha.*

Attorneys for defendants :—Messrs. *Thakurdas, Dharamsi, Cama and Hormusji.*

(1) (1812) 15 East, 209.

## APPELLATE CIVIL.

*Before Mr. Justice Parsons and Mr. Justice Ranade.*

1900. *April* 2.

BAROT NARAN (ORIGINAL DEFENDANT), APPELLANT, *v.* BAROT JESANG AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Adoption—Reversioner—Limitation Act (XV of* 1877*), Arts.* 118 *and* 141*—Suit by a reversioner for possession of immoveable property.*

A suit by a Hindu reversioner to recover possession of immoveable property after the death of a childless widow is barred by article 118 of the Limitation Act (XV of 1877) if the claim to such possession cannot be established without setting aside the defendant's adoption of which the plaintiff had become aware more than six years before suit.

Raiji Khoda, a Hindu, died in 1869 leaving behind him a childless widow. In 1884 plaintiffs applied for a certificate of heirship to the deceased's estate under Regulation VIII of 1827. The widow opposed the application alleging that the deceased had adopted a son (defendant No. 1) in 1863-64. The certificate was refused, and both parties were referred to a suit for the purpose of determining the question of the alleged adoption. But neither party filed a suit.

In 1897 the widow died and thereupon plaintiffs, as reversionary heirs, sued to recover possession of the deceased Raiji's property.

The defendant pleaded that he was the adopted son of Raiji, and that the suit was barred by limitation.

Both the lower Courts held that the adoption was not proved, and that the suit was not time-barred.

*Held*, on second appeal, that though the defendant's adoption was not proved, yet as he had all along asserted his adoption to the knowledge of the plaintiffs since 1884, plaintiffs' suit was barred by article 118 of the Limitation Act (XV of 1877).

SECOND appeal from the decision of Ráo Bahádur Lalshanker Umiashanker, Additional First Class Subordinate Judge, A. P., at Ahmedabad.

Suit by Hindu reversioners for possession of property to which they claimed to be entitled after a childless widow's death.

One Raiji Khoda died in 1869, leaving behind him a childless widow, Bai Datar.

Plaintiffs were the *pitrais* (paternal kinsmen) of the deceased.

In 1884 plaintiffs applied under Regulation VIII of 1827 for a

* Second Appeal, No. 795 of 1899.

certificate of heirship to Raiji. Bai Datar resisted the application on the ground that Raiji had adopted a son (the defendant), who as such adopted son had inherited his estate.

The Assistant Judge to whom the matter was referred for inquiry, held that the defendant's adoption was not proved.

The District Judge finding that the question of adoption was too complicated to be determined in a summary inquiry, passed an order in May, 1885, directing both parties to have the matter decided in a regular suit. But neither party filed a suit during Bai Datar's lifetime.

In January, 1897, Bai Datar died having made a will in 1890 bequeathing all her *stridhan* property to the defendant as her adopted son.

Thereupon plaintiffs brought this suit, as reversionary heirs of the deceased Raiji, to recover possession of his property both moveable and immoveable.

Defendant pleaded (*inter alia*) that he had been adopted by Raiji in 1863-64; that the fact of his adoption had become known to the plaintiffs in 1884; and as plaintiffs had not filed a suit to set aside his adoption within six years from the time they became aware of the adoption, the suit was barred by limitation.

The Court of first instance held that the defendant's adoption was not proved and on the authority of *Fannyamma* v. *Manjaya*[1] held also that the case was governed by article 141 and not by 118 of the Limitation Act (XV of 1877) and was not barred. It passed a decree for the plaintiff.

This decision was upheld, in appeal, by the District Judge.

Against this decision defendant now appealed to the High Court.

*L. A. Shah* for appellant.

*Branson* (with *G. S. Rao*) for respondents.

PARSONS, J.:—The plaintiffs sued to obtain possession of the estate of Raiji, who died in 1869, to which they became entitled on the death of his widow Bai Datar. Article 141 of the Limit-

(1) (1895) 21 Bom., 159.

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ation Act, 1877, gives them twelve years from the date when the widow died within which to bring their suit. She died in 1897, and they filed the present suit in the same year. On the face of the plaint, therefore, the suit is well within time. The defendant, however, alleged that he had been adopted by Raiji in 1863 and he pleaded that the plaintiffs were barred by prescription from disputing the fact and validity of his adoption, because they had not brought a suit to obtain a declaration that his alleged adoption never, in fact, took place within six years from the date when his alleged adoption became known to them.

There is no doubt that the defendant has all along asserted the fact of his adoption and that the plaintiffs in 1884 knew that he did so. It is also clear that the defendant, if he is the adopted son of Raiji, is the owner of his estate, so that the plaintiffs cannot succeed in the suit without disturbing the adoption. I should, however, have thought that there was no obligation upon the plaintiffs to have sued to have it declared that an adoption which was merely alleged to have taken place had never taken place, because the mere parol assertion of a status could not give rise to a cause of action or create a status that had no existence at all, and because the right to property is not declared to be extinguished under section 28 of the Limitation Act except at the determination of the period limited to any person for instituting a suit for possession of that property.

It has, however, been held that this is not the correct view to take in the case of an alleged adoption. The Limitation Act, article 118, enacts that a suit to declare that an alleged adoption never took place must be brought within six years from the date when the alleged adoption became known to the plaintiff, and a Full Bench of this Court has decided that, unless such a suit has been brought within the prescribed period, the plaintiff is barred by that article from disputing the fact of the adoption—*Shrinivas Murar* v. *Hanmant Chavdo* [1]. That is the case here. Although the defendant is found never to have been adopted, yet he said that he was, and because the plaintiffs did not sue within six years of their coming to know that he said so, the defendant must be held to have been legally adopted. We reverse the

(1) (1899) 24 Bom., 260.

decree of the lower Appellate Court and order plaintiffs' suit to be dismissed with all costs on them.

RANADE, J. :—The original suit was brought by the respondent-plaintiffs, as reversionary heirs on the death of one Bai Datar, widow of Raiji Khodidas, to recover possession of two houses, certain moveable property, and books of Vahivancha, from the appellant-defendant, who claimed to be Raiji's adopted son. Raiji was a barot, and he kept the genealogies of certain people, and followed the profession of a bhâta. He brought the defendant-appellant to live with him in his house as his son about 1864. Raiji died in 1869, and his widow Bai Datar and the defendant lived together as mother and son. In 1884 the respondent-plaintiffs applied for a certificate of heirship to Raiji. Bai Datar and the defendant resisted the claim on the ground that defendant was Raiji's adopted son. The District Court refused to grant the application, and referred the parties to a regular suit in May, 1885. Bai Datar died in January, 1897, and thereupon in 1898 the present suit was brought to recover possession of the houses and the books and to obtain an injunction against the defendant not to receive the dues from the yajmans of Raiji.

The defence was that Raiji adopted the defendant in 1863; that the plaintiffs had knowledge of the alleged adoption in the certificate proceedings of 1884; that the two houses had been in defendant's possession as heir, and also under Bai Datar's will made in July, 1890; that as no suit had been brought for more than twelve years from 1884, the plaintiffs' claim was time-barred; and that the injunction could not be granted.

The Court of first instance held that the alleged adoption was not proved; that the claim was not time-barred, as it was brought shortly after Bai Datar's death, when the cause of action arose; and that the respondent-plaintiffs were entitled to claim the property in dispute as reversionary heirs except one of the houses, which was held to be Bai Datar's *stridhan*, and, as such, was transferred to the defendant by her will. In appeal the District Court held that the other house, also included in the will, was built by Bai Datar, and was her *stridhan*. The claim for

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both houses was, therefore, disallowed, and in other respects the decree of the first Court was confirmed.

The original defendant preferred this second appeal chiefly in respect of the books of genealogy, and the injunction in respect of the dues collected from the yajmans. The appellant's contention was that the claim for the whole property of the plaintiffs was time-barred, and, therefore, should have been dismissed throughout.

The principal point for consideration, therefore, relates to the question of limitation, and that again turns on the enquiry when the cause of action accrued. The original plaintiffs urged that it accrued to them on the death of Bai Datar, while the defendant-appellant's contention was that it accrued when he claimed to be the adopted son in the certificate proceedings brought by plaintiffs in 1884, that is, more than twelve years before the date of the suit. In the Court of first instance, the question of limitation was decided in respondent-plaintiffs' favour on the ground that, as the claim was for the recovery of property, it was not necessary for the plaintiffs to set aside the defendant's alleged adoption under article 118 within six years from the certificate proceedings in which the plea of adoption was first raised; that article 141 of the Limitation Act applied; that this enlarged period of limitation was not curtailed by the results of the certificate proceedings, which, it was further urged, had decided adversely the claim for adoption. This view was accepted by the Judge of the lower Appellate Court, who held that the plaintiffs had no cause of action as long as Bai Datar was alive, and that defendant's possession was not adverse to plaintiffs, as he lived with Bai Datar till her death. These decisions were obviously based on the ruling in *Fannyamma* v. *Manjaya* [1] and the cases noted in that judgment. The correctness of this ruling was questioned in *Shriniwas Murar* v. *Hanmant Chavdo* [2] which was a Full Bench decision, when the whole subject was considered by five Judges, and it was held that the shorter period of limitation under article 118 governed a claim for recovery of the possession of immoveable property, wherever the

(1) (1895) 21 Bom., 159. (2) (1899) 24 Bom., 260.

claim to the property could not be established before setting aside an alleged adoption. It is not necessary, therefore, to consider the earlier authorities which are noticed in the Full Bench case. The respondent-plaintiffs cannot possibly succeed in their claim as reversionary heirs to the property in dispute, which has come into the possession of the appellant-defendant before the alleged adoption set up in 1884 in the certificate proceedings could be set aside, and as more than twelve years have passed since that claim was set up, it is clear that the present suit, though it does not expressly contain a prayer for setting aside the adoption, cannot be maintained merely because the claim is made for the recovery of the possession of the property.

It was indeed urged that the decision in the certificate proceedings was against the validity of the adoption; and that, therefore, the respondent-plaintiffs had no occasion to move in the matter till the death of Bai Datar, whose possession as Raiji's widow inured to her as a life interest till her death, and that as reversioners the respondents were entitled to bring their suit soon after Bai Datar's death. It appears, however, from the decision in the certificate proceedings that the adoption was not held invalid. The report of the Assistant Judge, no doubt, contains an expression of opinion to that effect, but the final order of the District Judge did not decide the question, and referred the parties to a regular suit. It was, therefore, incumbent on the respondent-plaintiffs to have removed this objection, within six years, and they were not entitled to wait during Bai Datar's lifetime. As they failed to take any action for more than twelve years, their claim was clearly time-barred. I would, therefore, reverse the decree of the Courts below, and reject the claim with costs.

*Decree reversed.*

## APPELLATE CIVIL.

*Before Mr. Justice Parsons and Mr. Justice Ranade.*

1900. *April 2.*

SHAMRAO PANDURANG (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE SECRETARY OF STATE FOR INDIA (ORIGINAL DEFENDANT), RESPONDENT.*

*Landlord and tenant—Lease—Condition—Condition binding tenant to reclaim land—Meaning of the word "reclaim"—Construction.*

On the 16th June, 1885, certain marshy land adjoining the sea comprising about 760 acres was leased by Government to the plaintiff in perpetuity, subject to the condition (*inter alia*) that if the whole of it was not reclaimed (*navasádhya*) by the end of ten years, the lease might be cancelled. At the end of the ten years only 83 acres of the land were actually under cultivation. The remainder had been rendered safe against the inroad of salt water. In March, 1896, the Government cancelled the lease on the ground that the plaintiff had not brought the whole of the land into cultivation. The plaintiff thereupon instituted this suit, praying for a declaration that the Government had no right to cancel the lease, and for an injunction restraining it from taking possession of the land. He contended that under the condition he was only bound to reclaim the land from the sea and that he had done so; that he was not bound to render the land fit for cultivation, but that, if he was, he had done so as far as it was possible.

*Held*, awarding the plaintiff's claim, that on the construction of the lease the term "reclaim" (*navasádhya*) as used in the grant meant nothing more than recovering the land from the dominion of the sea, and did not include the further obligation of rendering the land fit for cultivation. The plaintiff having erected the necessary embankments to shut out the sea was entitled to say that he had reclaimed the land and satisfied the terms of the grant.

APPEAL from the decision of M. B. Tyabji, District Judge of Thána.

On the 16th of June, 1885, the Government of Bombay granted to the plaintiff, Shamrao Pandurang, a lease of a large tract of marshy land bordering upon the sea and measuring about 760 acres, situate in the villages of Utan and Gorái in Sálsette.

The principal conditions of the lease were as follows:—

"1. The assessment has been excused for the first ten years commencing from the 1st of August, 1884.

"2. After ten years of remission in respect of the said land are over, for the next twenty years the lessee will pay assessment at 4 annas per acre per annum.

* Appeal, No. 100 of 1899.

"3. At the end of thirty years, the lessee will pay such assessment in respect of land as may be fixed on such land under the rules which may be then in force in respect of land to which survey settlement may be made applicable, and will continue to pay the same in future.

"4. Such portion of the said land as may be set apart for public roads shall be exempted from assessment.

"5. If a moiety of the said land is not reclaimed by the end of five years, and the whole land (is not reclaimed) by the end of ten years, or if the work of erecting embankments is not carried on with due diligence within one year from (the time when) the land comes into the lessee's possession, then the lease which has been given shall be cancelled. But the Collector is authorized to give it again if he likes."

The plaintiff erected embankments and shut out the sea water by building a dam 3½ miles long at a cost of over Rs. 40,000. Out of the total area of 760 acres, he brought into actual cultivation 83 acres. He alleged that of the remainder, 644 acres, though culturable, were not actually cultivated because he could not obtain tenants, but that the whole of the land had been reclaimed from the sea.

In October, 1895, the Collector gave notice to the plaintiff that as he had not brought the whole of the land under cultivation within ten years from the date of the grant, the lease would be cancelled, and on the 6th March, 1896, the lease was cancelled, and the plaintiff was called upon to deliver up possession of the land to Government.

The plaintiff thereupon instituted the present suit against the Secretary of State for India in Council for a declaration that Government had no right to cancel the lease, and for an injunction restraining it from taking possession of the land.

The defendant contended (*inter alia*) that the plaintiff had not complied with the terms of the lease, and that it was, therefore, properly cancelled.

The District Judge of Thána held that the plaintiff had to make the whole of the land fit for cultivation within ten years, and had, therefore, broken one of the main conditions of the lease, and that, consequently, the Collector had a right to cancel the lease.

He, therefore, dismissed the suit.

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Against this decision plaintiff appealed to the High Court.

*Manekshah Jehangirshah,* for appellant.

Ráo Bahádur *Vasudev J. Kirtikar* (Government Pleader) for respondent.

PARSONS, J.:—This suit is brought to try the validity of the action of the Collector cancelling a lease granted to the plaintiff on the 16th June, 1885. By that lease the occupation right over some 608 acres of marsh land at Gorái and Utan was let to the plaintiff in perpetuity subject to the payment of assessment on his promise to reclaim it. The official translation of the counterpart of the lease, which only is recorded in evidence, is as follows:—

"Kabuláyat. To Ráo Sáheb Mámlatdár of táluka Sálsette. I, Shamrao Pandurang, residing in house No. 28 in New Lane, Lohár Chawl, Bombay, do by this kabuláyat (accept the kháta of) the undermentioned land situate in the villages of mauje Utan and mauje Gorái in táluka Sálsette, district Thána, on behalf of myself and my future sub-khátedárs.

"1. Marsh land situate at mauje Gorái, being land measuring about 533 acres out of Survey No. 233 together with land appertaining to the 'Dongar' (hill) called Mudya which is situate therein.

"1. Salt marsh land out of the unassessed Parigh marsh land situate at mauje Utan, (measuring) about 75 (seventy-five) acres.

"The four boundaries of the lands situate in the two aforesaid villages are as follows:—

"1. On the east, marsh land out of Survey No. 233 situate at mauje Gorái and marsh land out of mauje Utan, beyond which there is the creek.

"1. On the south, land out of marsh land bearing Survey No. 233 situate at mauje Gorái and Survey No. 191, being Taljan land.

"1. On the west, land out of the unassessed Survey No. 233 situate at mauje Gorái; in the interval, land out of Survey Nos. 186—65; beyond (that), land out of Survey No. 295 situate at Utan.

"1. On the north, the salt marsh Kalya Maryachi, bearing Survey Nos. 311 and 312 out of Utan.

"I accept the kháta of the land situate within the aforesaid four boundaries and apply for my name being entered in Government records as the khátedár of the said lands.

"The said kháta has been given to me permanently under the conditions of clause 21 of Rules under the Land Revenue Code, subject to the provisions of the rules framed and brought into force under the Land Revenue Code of 1879. The said conditions are as follows:—

"1. The assessment has been excused for the first ten years commencing from the 1st of August, 1884.

"2. After ten years of remission in respect of the said land are over, for the next twenty years I will pay assessment at 4 (annas) per acre per annum.

"3. At the end of 30 (thirty) years, I will pay such assesment in respect of land as may be fixed on such land under the rules which may be then in force in respect of land to which survey settlement may be made applicable and will continue to pay the same in future.

"4. Such portion of the said land as may be set apart for public roads shall be exempted from assessment.

"5. If a moiety of the said land is not reclaimed by the end of five years and the whole land (is not reclaimed) by the end of ten years, or if the work of erecting embankments is not carried on with due diligence within 1 (one) year from (the time when) the land comes into possession, then the kháta which has been given shall be cancelled. But the Collector is authorized to give it again if he likes.

"Under the aforesaid conditions I have accepted the kháta. Dated the 16th of June, 1885. Place Bombay."

The material portion is clause 5 of the conditions. The original was evidently a translation into Maráthi of clause 21 of the Rules framed under the Land Revenue Code, in which the word is "reclaimed" was used. This word the person who drew up the lease translated by the word "*nausadh*". Apparently that word is unknown to the Maráthi language, but its component parts mean "new" and "acquired". It has been retranslated "reclaimed" by the official translator in this Court, and during the argument of this appeal it was practically assumed that there was no difference in meaning between the two words. The point, therefore, at issue is whether, at the end of the ten years allowed, the plaintiff had reclaimed the whole land. The District Judge thought that the plaintiff was bound to have made the land fit for cultivation. He says: "I think the terms of the agreement were satisfied if within five years half of the area was in a state in which a fair crop could have been raised, and if at the end of ten years a fair crop could have been raised on the whole land, making allowance for the portions unavoidably under water and unarable land." He held that the plaintiff had failed to make half of the land fit for cultivation within five years from the date of his agreement and the

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whole of it within ten years from that date, and he added "the failure seems to have been due to a sufficient number of small dams not having been put up." In a previous part of the judgment he had said that "salt land is reclaimed by enclosing it first within an embankment to shut out salt water and then dividing the area by means of small dams, within which sweet water is stored up. Unless the small dams are erected, according to Damodar a fair crop will not be obtained. See Campbell's Gazetteer, Volume XIII, pages 282, 283."

All this shows clearly that in the opinion of the District Judge it was necessary that the plaintiff should not only have kept the sea water out of the land, but should also have brought the land into such a state that fair crops could have been grown on the greater part of it. The total area of the land taken up by the plaintiff was, he says, about 760 acres. "Of this, after making allowances for the sandy and rocky portions, the area under channels and that under the embankments, and taking the land incapable of cultivation to be 200 acres, the residue is 560 acres." These 560 acres the plaintiff ought in the opinion of the Judge to have made fit for cultivation. It is admitted that the plaintiff had erected the necessary outer embankments and kept the sea water out of the area leased to him. He had erected a dam some 3½ miles long, 35 feet wide at the base, and 15 or 16 feet wide at the top at an actual cost of Rs. 40,000 and, to again use the words of the Judge, "had made the area granted to him practically safe against the inroad of salt water." It appears to me that this was sufficient, and that having done it, the plaintiff was entitled to say that he had reclaimed the land, that is, that he had recovered it from the dominion of the sea. This, I conceive, is the meaning of the word "reclaim". The purpose of the reclamation is a secondary matter which would have to be provided for specially. The District Judge thinks that in the present case the reclamation was to be made in order that the land might be rendered fit for cultivation. I do not know why it should be so, because there is nothing said in the lease about it. For all that appears from the lease the plaintiff having reclaimed the land might do whatever he liked with it. It certainly was not obligatory on him to make the whole land fit for cultivation, because he was allowed

to set apart such portion as he chose for roads, and the portion so set apart was to be exempted from assessment. The Judge also excepts about 200 acres as being incapable of cultivation, but this is introducing into the lease a condition which does not exist in it. If the impossibility of cultivating the whole land is conceded in this way, it is a very strong argument that it was not the intention of the parties that the whole should be made fit for cultivation, and that the difficulty will arise of determining how much was to be made fit for cultivation. There are no means of solving that difficulty, and the Judge has not attempted to do so. His judgment merely sets out what according to the witnesses was the amount of actual cultivation, and he gives no opinion as to the value of that evidence. It is obvious that the actual area cultivated is not the same as the actual culturable area. The evidence as to the extent of the latter has not been alluded to by the Judge. If, however, we turn to that evidence, it would seem that it supports the plaintiff's case most strongly,—for instance, witness Exhibit 100, called for the defendant, says that "the whole area of the khár is 759 acres, of that 83 acres are under cultivation and 644 acres are not cultivated though culturable." I take it that the word "culturable" is used in its ordinary meaning, namely, able to be cultivated, especially as the witness says that if a dam is made and fresh water falls on salt land for two or three years, it becomes sweet and can be cultivated. The plaintiff says that the land is fit for cultivation, and that the only reason it has not been cultivated is that he could not get tenants to cultivate it. I think that he is entitled to be believed when he says this. It is clearly to his benefit to have the land cultivated, for he has to pay assessment upon it whether it is cultivated or not, and he naturally would use his best endeavours to obtain some rent for it. It does not appear why the Government should have resolved to cancel the lease at the end of ten years when, if their contention is correct, they could have done so just as legally after five years had elapsed, for the same state of things existed then as now as regards the small portion of the land under actual cultivation, then less than half, now less than the whole. However, nothing turns upon this forbearance on their part.

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In my opinion the conditions of the lease have not been broken by the plaintiff. The work of erecting embankments (the only work specified in the lease) has been done, and the land has been reclaimed from the sea. The work of making it fit for cultivation is not included in the lease, but even if it had been, I could not find, on a consideration of the evidence which is on the record, that that has not been done. All that the evidence proves is that only a small portion of the land has been actually cultivated, but actual cultivation is certainly not one of the conditions of the lease. This is the only point at issue in the appeal. The other points about the agreement that the plaintiff was called on to pass, and about the fishing, were found against the defendant by the District Judge, and no objection has been taken thereto.

We reverse the decree of the District Judge and award the plaintiff the relief he claims with his cost in this litigation.

RANADE, J. :—The principal point in dispute in this appeal turns upon the construction of a reclamation lease or agreement passed by the appellant-plaintiff to the defendant-respondent on the 16th June, 1885, and which agreement was cancelled by the respondent early in 1896. This cancellation was made on the ground that the appellant-plaintiff had failed to carry out the conditions of the contract contained in the agreement of June, 1885, in that he did not reclaim the whole of the land so as to render it fit for cultivation, but only reclaimed a very small portion of the same; the defendant-respondent contended that this failure of the appellant-plaintiff justified his action in cancelling the lease. On the other hand the appellant-plaintiff claims that he had carried out the terms of the contract which related to the reclamation of the land, and the respondent had no right to put an end to it by resuming the concession of the lease. This is the principal point on which the parties are at issue. There are minor contentions which have to be considered along with it, as they have an important bearing on the principal dispute.

The land to be reclaimed was situated in two villages, about 652 acres in Gorái and nearly 107 acres at Utan. This area was admittedly swampy land covered with salt water at high tide,

and its reclamation was undertaken by the appellant-plaintiff. The concession was sanctioned in February, 1884, and, in pursuance of previous correspondence between the parties, the swampy land mentioned above, together with some hill land given on survey tenure, was placed in the possession of the appellant-plaintiff in May, 1884, and he was made a khátedár of the land. As far as the swampy land was concerned, the terms agreed were not reduced to writing, but reference was made in this correspondence to Rule 21 of the Rules made under Land Revenue Code, section 214.

In 1885 a Maráthi kabuláyat was passed by plaintiff-appellant to respondent which set forth the terms on which the concession was made. The principal condition was to reclaim half the land in five and the whole land in ten years. After which time assessment was to be paid in part and after thirty years full assessment was to be levied. No counterpart lease was prepared by the respondent till February, 1892, when a draft indenture was prepared and sent for his signature to the appellant. As the draft indenture did not in some details conform to the Maráthi kabuláyat passed in June, 1885, the appellant-plaintiff declined to execute it. He remained in possession of the whole kháta as before and paid the assessment in part as provided for in 1895 when the ten years' term was over. In October, 1895, the respondent issued a notice to the plaintiff stating that, as he had only brought five acres of the land under cultivation he had broken the terms of the contract which required him to bring the whole land into cultivation in ten years, and he was asked to show cause why the kháta should not be cancelled. On 6th March, 1896, notice cancelling the kháta in appellant-plaintiff's name was issued, and his application to the Government was disallowed in May, 1896. In August, 1896, the Mámlatdár called on the appellant-plaintiff to make over possession of the land to Government, and this led to the institution of the present suit on 12th August, 1896.

In this plaint the appellant-plaintiff prayed for a declaration that the land was granted in perpetuity under Rule 21, and the defendant had no right to cancel the same. There was also a prayer for

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injunction to restrain the defendant from taking possession and also requiring the defendant to execute a lease in perpetuity of the lands in accordance with the Rule 21. The defence was chiefly based on the allegation that the plaintiff-appellant had broken the conditions of his contract, in that he had not reclaimed,—so as to render fit for cultivation the whole of the land included in the reclamation lease, but reclaimed only 84 acres. There were also the further contentions that the term of the lease was not perpetual, but it was only passed in accordance with Rule 21 framed under section 214 of the Land Revenue Code; that the indenture of 1892 was one which the plaintiff was bound to execute under Rule 31, and his failure to do so discharged the defendant from granting any further lease; that under the circumstances defendant was justified in cancelling the lease.

The parties joined issue on these pleadings, and the lower Court found that the plaintiff-appellant was entitled to an occupancy in perpetuity of the land in dispute, subject to Rule 21; and that the respondent-defendant was not entitled to require the plaintiff to accept the lease as contained in the draft of 1892, which differed in material respects from the agreement of June, 1885. While this issue was found in plaintiff's favour, the lower Court found on second and third issues that the plaintiff had failed to reclaim the whole of the land as stipulated in his agreement, and that, therefore, the defendant had a right to resume the land. Plaintiff's claim was, therefore, rejected. In his appeal before us the appellant contends that the lower Court was in error in holding that the reclamation of the land had not been made as provided by the agreement of June, 1885. He contended that all that he had bound himself to do was reclamation of the land from the sea, which work had been completed, and that the work of rendering the land fit for cultivation did not come within the agreement, and even if it did, the agreement was carried out to the extent it was possible to do so in respect of all lands which were not incapable of being brought under cultivation. Under the circumstances the appellant contended that he was entitled to the injunction and declaration sought.

It will be seen from these contentions that, as stated at the commencement, the whole dispute turns on the inquiry whether the original agreement contemplated reclamation in the stricter or the more liberal sense. Plaintiff-appellant construes the word "reclamation" or the Maráthi ward *navasadhya* used in the agreement of June, 1885, as being intended for the work of recovering the land from the sea, while the respondent contends that the word "reclamation" or its Maráthi equivalent *navasadhya* included the further obligation to make the land fit for cultivation. The lower Court has accepted this latter view, and held that the reclamation work had not been completed. Rule 21 of the Rules under section 214 must be read in connection with the rules which go before it and those which come after it. Rule 15 relates to grants of occupancy, which either relate to lands (*a*) to which a survey settlement has been extended and (*b*) to lands to which a survey settlement has not been extended. The Rules 16 to 20 relate to lands to which survey settlement has been extended, and Rule 21 and the following rules apply to lands to which survey settlement has not been extended. Rule 19 provides for imposing reduced assessment or giving rent-free land for a term when the bringing of any such numbers under cultivation will be attended with a large expense. Rule 21 relates to the reclamation of salt marshes. The object there stated is not, as in Rule 19, bringing land under cultivation, but reclaiming such salt lands obviously protecting them from their liability to be submerged by the tides. In sub-clause 5 of Rule 21 the words are "if half the area is not reclaimed in five years, and the whole in ten years, the concession may be resumed." It will be thus seen that some difference must be recognised between reclamations, as such, of salt or marshy lands and encouragement to the cultivation of unarable lands. In the present case the object was chiefly to induce the appellant-plaintiff to undertake the reclamation. Mr. Mackenzie, the Collector of Thána, referred the plaintiff to Rule 21 as being sufficient for the purpose of encouraging the reclamation he intended to undertake. The Maráthi agreement of June, 1885, has obviously used the word *navasadhya* as a translation of the word "reclamation". The full reclamation, it was contemplated, would take at

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least thirty years before it could be held to be complete in its larger sense. The obligations undertaken by the plaintiff were (1) within one year he should complete the embankments; (2) within five years half the land; and (3) within ten years the whole land should be made *navasadhya*. If any of these obligations were not fulfilled, the lease was to be cancelled. The word *navasadhya* in this place could only have been meant to be used for the word "reclamation" in its stricter sense; as the dictionaries define it, reclamation means in the case of submerged or overflowed land the rescuing of it from being submerged. The rendering it fit for cultivation is not the original meaning in regard to submerged land. That would be its meaning in regard to the reclamation of unarable land. This distinction between the larger and the narrower sense becomes still more obvious by comparing the words used in the draft indenture prepared by the respondent, where throughout the words used are *navasadhita karil va lagavadis anil*, meaning would reclaim and bring under cultivation. If the word *navasadhya* itself included the idea of bringing the land under cultivation, this emphatic addition of the condition about cultivation throughout this draft would not have been made. No such words of addition are used in the Maráthi agreement of 1885 as also in the notice of 4th October, 1895, where the only words used are that he had not made the land *navasadhya*. In his written statement, again, the defendant found it necessary to state by way of explanation that the failure to make the land *navasadhya* means that plaintiff had failed to make the khár land fit for cultivation. It was also sought to make out that plaintiff tried to obtain his income from fisheries, which use of the land did not amount to reclamation. This extension of the word "reclamation" so as to include the necessity of cultivation was not obviously what Mr. Mackenzie had contemplated in his correspondence with plaintiff. He simply referred plaintiff to Rule 21. He writes to say that the Commissioner has sanctioned that the terms in regard to the swampy land shall be those laid down by Rule 21. Mr. Mackenzie agreed to allow the appellant-plaintiff to be made khátedár of the lands. In the Maráthi agreement the word *nirantar* is used, subject of course to the Rule 21 of the

Code, *i. e.* subject to cancelment under certain conditions. The conditions required that in five and ten years the land should be reclaimed *navasadhya* half and whole.

As a matter of fact, it appears from the evidence on either side that the embankments were completed within the time agreed, namely, one year. No objection is taken on that account. The Commissioner's report further shows that out of the whole area 759 acres of the swampy land exposed to the sea, as many as 644 acres were dry land, though not cultivated, 83 actually cultivated, and only 7 acres were exposed to the sea and 23 acres represented a fishery. In all thus 30 acres alone remained to be unreclaimed. This small exception of land liable to sea floods was inevitable in the nature of things. The oral evidence of the plaintiff shows that about 200 acres were in a fit state for cultivation. Plaintiff's witness No. 76 says about 350 acres were in that condition, and he produced some 16 kabuláyats. Of these kabuláyats a kabuláyat of 100 acres was passed in 1890 (Exhibit 77), and the rest were in 1892 (Exhibits 78—91). They together made up 200 acres. The kabuláyats were for five years and the total acreage would be about 300 acres (Exhibits 78—91). The evidence of Kalya, Exhibit 182, shows that 300 acres were cultivated and 150 acres were rocky, which could never be brought under cultivation. If plaintiff had put up the dams inside the khár and not left them to be put up by the tenants, more land would have been under cultivation. But for his failure in this respect, plaintiff had himself to suffer, for he lost the income of his khár. Smaller areas are mentioned by defendant's witnesses, but as their estimates ranged from 5 to 100, their evidence is less reliable than that of the plaintiff's. The lower Court does not appear to have taken sufficient account of these variations, as also of the difficulties which plaintiff found in bringing cultivators with means to make their own dams, as they undertook to do in the kabuláyats passed by them. The Commissioner's report leaves no room for doubt about the fact that the land was dry for the most part, and the reclamation was, therefore, complete as far as the appellant had undertaken to complete it. The appellant-plaintiff could have no interest in not cultivating the land if he could do so, for he was the principal sufferer. The khár lands always take a long time

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to improve in quality, and that was the reason why the defendant allowed thirty years' term before full assessment was to be taken. Rain water has to be detained on the land and its silt allowed to accumulate from year to year before its saltish defects are cured and the land made fit for rice cultivation. The test of cultivation, therefore, was not a test which could have been in the contemplation of the parties in regard to these lands when such short periods as five and ten years were prescribed for reclamation. On the whole, therefore, it appears to me that the proper construction to be placed on the original agreement of the parties is that *navasadhya* meant reclamation in its stricter sense, and this condition was satisfied when the land was rendered dry and protected against the sea tides. This work was admittedly completed within the period stipulated, when nearly 700 acres were made dry, and even according to the defendant's witnesses, 83 or 100 acres were cultivated, while according to plaintiff's witnesses, actual cultivation extended over 300 acres. Plaintiff's evidence shows that this work of reclamation cost him a very large sum estimated at Rs. 40,000. And after such expenditure the appellant-plaintiff must, therefore, be held to have carried out the contract, and there was no breach of it, on his part, of a kind which the respondent could enforce by cancelling the lease.

As regards the other grounds on which the lease was cancelled, it appears to me that the District Judge was right in holding that the use of the fisheries and the realization of some money on that account, did not constitute a breach of the conditions, as this seems to have been in accordance with the custom which is recognised and proved by defendant's witnesses. It follows that the decision of the lower Court on second and third issues laid down by it cannot be supported. The plaintiff-appellant is thus entitled to the declaration and injunction sought by him. The insertion of the condition of 999 years, as also the levy of a nominal one pie assessment, and the condition about obtaining the sanction of the Collector before sub-letting or alienating of the lands, and the exclusion of the khan or quarry made over in the first concession, were inconsistent with the original agreement between the parties and could not be enforced. There was, in fact, no occasion to enforce a new lease under the circumstances

of this case. The Collector of Thána suggested as much, but he was overruled. If the indenture was necessary, it should have been in accordance with the Maráthi agreement of 1885. The District Judge's view on this point seems to be correct. I would, therefore, reverse the decree of the lower Court and award the plaintiff's claim, in regard to both the declaration and injunctions sought by him.

*Decree reversed.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Parsons and Mr. Justice Ranade.*

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*April* 10.

*Evidence—Dying declaration—Indian Penal Code (Act XLV of 1860), Sec. 396.*

Appellant was convicted and sentenced to transportation for life on a charge of dacoity. The most material evidence for the prosecution was the statement, in the nature of a dying declaration, made to the jamádár of police by one Fakiria Shimpi, who received wounds during the dacoity and who died before the trial commenced.

The Assistant Surgeon, who made the *post-mortem* examination on the deceased, was not called, being on leave, but the Civil Surgeon, on a perusal of the notes left by the Assistant Surgeon, gave evidence that the cause of death of the deceased was pneumonia aggravated by a stab. In the notes themselves no cause of death was given, and there was no evidence as to how the pneumonia was aggravated. No explanation was given as to how the opinion was formed that the pneumonia was aggravated by the injury, and there was nothing in the notes to support it.

*Held*, that the statement of the deceased ought not to have been admitted in evidence in the absence of evidence to show that his death was caused or accelerated by the wounds received at the dacoity, or that the dacoity was the transaction which resulted in his death.

APPEAL from the conviction and sentence recorded by R. J. C. Lord, Sessions Judge of Dhárwár.

The accused was tried (with two others) on a charge of dacoity under section 396 of the Indian Penal Code (Act XLV of 1860) by the Sessions Judge assisted by two Assessors. The Judge

* Criminal Appeal, No. 83 of 1900.

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differing from both the Assessors found the accused guilty of the offence charged, and sentenced him to transportation for life.

The case for the prosecution was that the accused was one of the gang of dacoits who attacked and looted a wedding procession, and during the affray the accused stabbed the deceased Fakiria Shimpi. The dacoity took place on the evening of the 12th August, 1899. A statement, made by the deceased, was recorded by a police jamádár on the 13th August, because he thought that the deceased was on the point of death, and the Magistrate, who had been sent for, had not arrived. In that statement the deceased stated that the accused gave him a stab on the right side of his chest. The deceased died on the 20th August. The conviction and sentence were mainly based upon the alleged dying declaration and the deposition of one witness. The accused preferred an appeal, urging (*inter alia*) that the so-called dying declaration was not properly recorded, and should be left out of consideration, and that the evidence of the witness on whom the Judge relied was unreliable.

*Mahadeo B. Chaubal*, for the appellant (accused).

Ráo Bahádur *Vasudev J. Kirtikar* (Government Pleader) for the Crown.

PARSONS, J.:—The dacoity is alleged to have taken place on the evening of the 12th August, and clothes and ornaments to the value of some Rs. 2,750 are said to have been stolen, of which a silver *tolbandi* and a few clothes only have been recovered. Nothing, however, was found in the possession of the appellant, who was the accused No. 1 in the Sessions Court, and he was convicted by the Sessions Judge solely because the latter saw no reason to distrust the dying declaration of Fakiria Shimpi and the deposition of witness No. 1. The Assessors were of opinion that he was not guilty. We think that the charge is not proved against him. The declaration of Fakiria Shimpi must be eliminated from the evidence. It was made on the 13th August, and Fakiria died on the 20th. The Assistant Surgeon, who made the *post-mortem* examination, has not been examined as a witness. The Sessions Judge says as to this: "The Civil Surgeon had to be asked to give his opinion upon the Assistant Surgeon's notes of

the *post-mortem*, his handwriting being proved by the compounder, because the Assistant Surgeon had gone on leave: the proceeding appeared to be somewhat objectionable, but under the circumstances was unavoidable. The opinion of the expert was, however, in favour of the defence, and the charge against the accused reduces itself naturally to one of dacoity alone." The Civil Surgeon says: "From those notes I find that the corpse had a wound in the right axilla. Also one of the ribs was fractured. From the report and the facts it contains I am certain that the cause of death was pneumonia. The pneumonia was aggravated by the injury, though not caused by it: the adhesions point to chronic lung disease, and I consider the man must have been ill before. From the notes I am of opinion that the wound was not such as would be likely, in the ordinary course of nature, to cause death." No explanation is given as to how the opinion was formed that the pneumonia was aggravated by the injury, and there is nothing in the notes to support it. The cause of death is not mentioned in them. In the absence of evidence to prove that the death of Fakiria Shimpi was caused or accelerated by the wounds received at the dacoity, or that it was the transaction which resulted in his death, his declaration ought not to have been admitted in evidence.

There remains only the statement of the complainant. The delay in naming the accused as one of the dacoits is such as to render the evidence of little value. The reason given for not telling the village officers, namely, that the complainant was a stranger and the dacoits were of the same village as those officers, is not true because the accused was not an inhabitant of the same village as those officers. The further reason that he thought it better to mention all the names at one time is also untrue, because the accused No. 3 was then and there in the custody of the village officers, and was named by the complainant. Besides, if he would not tell the village officers, there was no reason why he should not have told Fakiria Pinjar, Fakiria Kurbav, Shamava and Gadigyavva, and he gives none. The accused is an inhabitant of the same village as the complainant and was known to him before, and the fact that he did not mention his name at once throws great doubt upon his after identification, particularly when

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the witnesses Nos. 2 and 3, who were spectators or victims of the dacoity and who also knew the accused No. 1 before, say that they did not see him at it. Very little weight seems to have been attached to the evidence at the time, because we find that the house of the accused was not searched till the 18th, and he was not arrested till the 19th.

We reverse the conviction and sentence passed upon the appellant, acquit him of the offence charged, and direct that he be set at liberty.

*Conviction and sentence reversed.*

## CRIMINAL REFERENCE.

*Before Mr. Justice Parsons and Mr. Justice Ranade.*

1900.
*April* 17.

*IN RE* GOVIND HANMANT.*

*Criminal Procedure Code (Act V of* 1898*), Sec.* 250*—Application for an order that a person should give security to keep the peace—Refusal of application—Compensation under Section* 250 *of Criminal Procedure Code (V of* 1898*).*

To justify the application of section 250, a person must be accused before a Magistrate of an offence triable by a Magistrate.

A applied to a Magistrate of the First Class to order B to give security to keep the peace (section 107, Criminal Procedure Code, 1898). The Magistrate after inquiring into the matter discharged B under section 119 of the Criminal Procedure Code and directed A to pay B Rs. 50 as compensation under section 250 of the Code.

*Held*, that the award of compensation was illegal. The institution of proceedings under section 107 of the Criminal Procedure Code was not an accusation of an offence triable by a Magistrate within the meaning of section 250 of the Code.

*Queen-Empress* v. *Lakhpat*[1] followed.

REFERENCE under section 438 of the Criminal Procedure Code (Act V of 1898) by F. C. O. Beaman, Sessions Judge of Belgaum.

One Govind Hanmant Kulkarni applied under section 107 of the Criminal Procedure Code (Act V of 1898) to the First Class

* Criminal Reference, No. 5 of 1900.

(1) (1893) 15 All., 365.

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IN RE GOVIND HANMANT.

Magistrate of Belgaum to order Rachaya bin Chenbasaya to give security for keeping the peace.

The Magistrate after inquiring into the matter discharged Rachaya under section 119 of the Code and at the same time passed an order under section 250, directing the applicant to pay Rs. 50 as compensation to Rachaya.

The Sessions Judge being of opinion that this order for compensation was illegal, referred the case to the High Court under section 438 of the Code.

The reference was argued before Parsons and Ranade, JJ.

*N. P. Patankar* for applicant.

There was no appearance for the opponent.

PARSONS, J.:—The applicant moved the Magistrate to take security from the opponent to keep the peace. The Magistrate issued the necessary notices and enquired into the matter under section 117, and discharged the opponent under section 119 of the Criminal Procedure Code. He further directed the applicant to pay the opponent the sum of Rs. 50 under section 250 of the said Code.

It is objected that this latter order is illegal. The objection seems good. To justify the application of section 250 a person must be accused before a Magistrate of an offence triable by a Magistrate. Here the opponent was not accused of having committed any offence. The only charge heard against him was that he was likely to do some act that would probably occasion a breach of the peace, and that it was necessary, therefore, that he should give security for keeping the peace. This is not a case that falls within the purview of section 250. We agree on this point with the Allahabad High Court in *Queen-Empress* v. *Lakhpat* [1].

We reverse the order of compensation.

*Order reversed.*

[1] (1893) 15 All., 365.

## APPELLATE CIVIL.

*Before Mr. Justice Fulton and Mr. Justice Crowe.*

1900. *June* 20.

GOPAL AMRIT (ORIGINAL PLAINTIFF), APPELLANT, *v.* ANNABHAT (ORIGINAL DEFENDANT), RESPONDENT.*

*Registration Act (III of* 1877), *Secs.* 3, 28, 64 *and* 65—*Registration—Registration of a document relating to property situate partly outside British India.*

A document relating to immoveable property which is partly situate within British India and partly outside British India, can be registered, under Act III of 1877, in the district in which a portion of the property is situate.

SECOND appeal from the decision of J. B. Alcock, District Judge of Násik.

Plaintiff sued for an order directing the registration of a document alleged to have been executed by defendant.

The document related to immoveable property a portion of which was situate in British India and the rest in the Nizám's Territory.

The Court of first instance awarded the plaintiff's claim.

This decision was reversed, on appeal, by the District Judge. His judgment was as follows:—

"The Registration Act applies to property in British India. This appears from the preamble. Provision is made for the case of a document relating to property situate in more than one district, by section 64. Under that section the sub-registrar of the district in which the document is presented for registration has to notify the fact to the sub-registrars of the other districts. But there is not and cannot be any provision for notifying such registration in a district outside of British India. An exception is made in the case of wills. It appears to me to be quite clear that as the Act only applies to British India, documents relating to property outside British India cannot be registered under the Act.

"The lower Court thought that there can be no objection to the registration of the document 'for purposes which may require its enforcement in British India.' There is, however, no provision for partial registration in the Act."

Against this decision plaintiff preferred a second appeal to the High Court.

*Robertson* (with *N. G. Chandavarkar*) for appellant.

* Second Appeal, No. 32 of 1900.

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GOPAL v. ANNABHAT.

*Lang*, Advocate General (with *D. A. Khare*) for respondent.

FULTON, J.:—We think the District Judge was mistaken in holding that the document in question could not be registered in the Násik District, because, although a portion of the property was situated in that district, another portion was situated in the territories of H. H. the Nizám. Section 28 in Part V of the Registration Act is clear: "Save as in this part otherwise provided, every document mentioned in section 17, clauses *a*, *b*, *c* and *d*, and section 18, clauses *a*, *b* and *c*, shall be presented for registration in the office of a sub-registrar within whose sub-district the whole or some portion of the property to which such document relates is situate." Part V contains no other provision touching the registration of such a document as the one under consideration.

The District Judge thought a difficulty arose from the requirements of section 64, but that section must be read along with section 65 and the two sections clearly refer to cases where the property is situated in more districts or sub-districts than one as defined in section 3 of the Act. They have no application where part of the property is situated outside British India. They do not affect the right of the party to have his document registered. They relate to the procedure to be adopted by the registering officer after registration. The mere fact that, owing to part of the property being situate outside British India, it is not possible for him to comply fully with the provisions of section 64, relating to immoveable property not wholly situate in his own sub-district, does not, in our opinion, relieve him from the necessity of granting registration when the requirements of the law which entitle the party to have his document registered have been complied with.

We reverse the decree of the District Judge and restore that of the Subordinate Judge, with costs on the defendant throughout.

*Decree reversed.*

# ORIGINAL CIVIL.

*Before Mr. Justice Russell and on appeal before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Tyabji.*

1900.
*March 23.*

TURNER (ORIGINAL DEFENDANT No. 1), APPELLANT, *v.* THE BANK OF BOMBAY (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Bank of Bombay—Presidency Banks Act (XI of 1876), Secs. 36 and 37 —Powers of directors to lend money on equitable mortgage.*

The directors of the Bank of Bombay discounted at different times promissory notes for sums amounting in all to about Rs. 60,000 drawn by the firm of Fazulbhoy Meheralli Chinoy in favour of one Meheralli Mahomed Chinoy, who, it subsequently appeared, was a partner in the firm, but was not known to be so at the time of the said transactions. Before discounting the later notes the directors of the Bank obtained from Meheralli an equitable mortgage by deposit of title-deeds on certain immoveable properties situate in Bombay and Mahábaleshvar as security for the then existing and future indebtedness of the said firm or Meheralli to the Bank. The notes became due and were dishonoured, the firm having in the meanwhile become insolvent. The Bank thereupon sued the Official Assignee, as assignee of the firm's estate, to recover the sums due on the notes and for a declaration that it was entitled to a charge on the immoveable properties held by it as security. The Official Assignee contended that under section 37 of the Presidency Banks Act (XI of 1876) it was illegal for the Bank to lend money on equitable mortgage and that no valid charge had been created.

*Held* that, notwithstanding the provisions of the said Act, the Bank was entitled to realize the securities,

*Held*, also, that the provisions of section 37 of the Act did not invalidate a charge on immoveable property created as a security for a *bonâ fide* liability already in existence.

The words of section 37 impose a restriction on making a loan on mortgage of immoveable property, not upon the Bank but upon the directors. As between the directors and the Bank the directors would be liable for any loss resulting from the breach of the provisions of the sections, but the mortgagors could not repudiate the obligation into which they purported to enter, and the Official Assignee was not in a more favourable position.

SUIT by the Bank of Bombay against C. A. Turner, Official Assignee and assignee of the estate of Fazulbhoy Meheralli Chinoy and Goolam Husain Meheralli Chinoy, insolvents, for Rs. 60,390, and for a declaration that the Bank was entitled to a charge on certain immoveable properties held by it as security by way of equitable mortgage and for sale thereof, &c.

* Suit No. 500 of 1899; Appeal No. 1070.

Fazulbhoy Meheralli Chinoy and Goolam Husain Meheralli Chinoy carried on business in partnership as merchants in Bombay under the style of "Fazulbhoy Meheralli Chinoy." It subsequently appeared that one Meheralli Mahomed Chinoy was also a partner, but at the time of the transaction in question in this suit the plaintiff Bank was not aware that he was a partner.

On the 5th July, 1897, the firm of Fazulbhoy Meheralli Chinoy passed a promissory note for Rs. 15,000 in favour of Meheralli, and he, prior to 2nd August, 1897, endorsed it to the plaintiff Bank for value. The promissory note was payable 68 days after date.

On the 2nd August, 1897, Meheralli again applied to the Bank to discount for him another promissory note for Rs. 25,000 payable 93 days after date passed in his favour by the said firm as before. The plaintiff Bank agreed to do it on condition that Meheralli should deposit with them, by way of equitable mortgage, title-deeds of certain immoveable property in Bombay as security to cover all debts owing to the Bank by him and the said firm of Fazulbhoy Meheralli Chinoy then existing as well as those to be incurred thereafter. The title-deeds were accordingly deposited by way of equitable mortgage and the Bank cashed the promissory note to Meheralli.

On the 25th August, 1897, Meheralli and Goolam Husain requested the Bank to discount a third promissory note for Rs. 20,000 drawn in favour of Meheralli by the same firm, and payable 60 days after date. The plaintiff Bank agreed to do so on having an equitable mortgage by deposit of title-deeds of certain immoveable properties situate at Mahábaleshvar in the Presidency of Bombay and of the furniture, &c., therein, and a charge on five shares of Rs. 500 each in the Bank of Bombay in the name of the said Meheralli M. Chinoy as further security for all the then existing and future indebtedness of the said firm, or the said Meheralli or either of them. The above security was given to the Bank by Meheralli and Goolam Husain, and the Bank thereupon discounted to Meheralli the promissory note of the firm, dated 25th August, 1897, for Rs. 20,000 drawn in his favour by the firm payable 60 days after date and endorsed by him to the Bank.

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On the 13th September, 1897, Meheralli Mahomed Chinoy, Fazulbhoy Meheralli Chinoy and Goolam Husain Chinoy as alleged partners in the said firm of Fazulbhoy Meheralli Chinoy were adjudged insolvents and their estates vested in the defendant, C. A. Turner, the Official Assignee.

The above mentioned three promissory notes fell due on the 14th September, 1897, 6th November, 1897, and 27th October, 1897, respectively, and were dishonoured. Notice of dishonour was duly given to the indorser and the Official Assignee.

The Bank now claimed Rs. 60,390-11-3 in respect of the three promissory notes and they prayed judgment for that amount against the defendants, and a declaration that they were entitled to a charge on the properties mortgaged as above stated, and that the same might be sold and the proceeds applied in satisfaction of their claim.

The first defendant in his written statement raised the question as to whether the Bank of Bombay under the Presidency Banks Act (XI of 1876)[1] could accept title-deeds as security. The following clauses of his written statement are material:—

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(1) Sections 36 and 37 of the Presidency Banks Act (XI of 1876):—

"36. The Bank is authorized to carry on and transact the several kinds of business hereinafter specified (that is to say):—

(*a*) the advancing and lending money, and opening cash credits, upon the security of (after stating the various kinds of Government stock and municipal, &c., debentures, &c.:—) * * * * * *

(*b*) Accepted bills of exchange and promissory notes endorsed by the payees. * * * * * * * * * *

"37. The directors shall not transact any kind of banking business other than those above specified, and in particular they shall not make any loan or advance

(*a*) for a longer period than three months;

(*b*) upon the security of stock or shares of the Bank of which they are directors; or

(*c*) upon mortgage, or in any other manner upon the security of any immoveable property or the documents of title relating thereto;

Nor shall they (except upon the security mentioned in section 36, paragraph (*a*), Nos. 1 to 5 inclusive)—

(*d*) discount bills for any individual or partnership firm for an amount exceeding in the whole at any one time such sum as may be prescribed by the bye-laws for the time being in force, or lend or advance in any way to any individual or partnership firm an amount exceeding in the whole at any one time such sum as may be so prescribed;

"3. This defendant submits that the alleged deposits of title-deeds could not, in law, create any lien or charge in favour of the Bank for payment of any one of the said three promissory notes.

"4. This defendant submits that the dealings alleged by the plaintiff in paragraphs 3 and 4 of the plaint are forbidden by law, *i. e.* section 37 of the Presidency Banks Act, 1876, and are of such a nature that if permitted would defeat the provisions of law, *i. e.* the said section 37, and are opposed to public policy.

"5. This defendant further submits that the alleged deposits on 2nd August and 25th August, 1897, being forbidden by, and opposed to, law and public policy so far as the bills of those two dates, respectively, are concerned, the same are void as to the past and the future indebtedness, also as being parts of an arrangement indivisible in its nature, which arrangement is forbidden by, and opposed to, law and public policy."

At the hearing the following issue was raised on behalf of the first defendant:—

Whether by the alleged deposit of title-deeds any lien or charge in favour of the Bank was created in respect of any of the sums in the plaint referred to under the Presidency Banks Act, 1876, or otherwise.

*Macpherson* and *Scott*, for plaintiffs.

*Anderson* and *Raikes*, for defendants.

The following authorities were referred to:—Presidency Banks Act (XI of 1876), secs. 4, 5, 7, 36 and 37; *Taylor* v. *Chichester, &c., Railway Co.* [1]; *L. & N. W. Railway Co.* v. *Price* [2]; Pollock

(*e*) Nor shall they discount or buy, or advance and lend, or open cash credits, on the security of any negotiable instrument of any individual or partnership firm, payable in the town or at the place where it is presented for discount, which does not carry on it the several responsibilities of at least two persons or firms unconnected with each other in general partnership;

(*f*) Nor shall they discount or buy or advance and lend, or open cash credits, on the security of any negotiable security having at the date of the proposed transaction a longer period to run than three months, or, if drawn after sight, drawn for a longer period than three months; provided that in the case of the Bank of Madras, &c., &c.—

Nothing contained in this Act shall be deemed to prevent the directors from allowing any person who keeps an account with the Bank from overdrawing such account, without security, to the extent of sums not exceeding at any one time two thousand rupees in the whole."

[1] (1867) L. R., 2 Exch., 356. [2] (1883) 11 Q. B. D., 485.

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on Contracts, p. 691; *Cherry* v. *Colonial Bank of Australasia*(1) Contract Act (IX of 1872), sec. 23; *Kumola Kant* v. *Kanoo Mahomed*(2).

RUSSELL, J.:—In this case the Bank of Bombay, as plaintiffs, sue to recover against the first defendant, Mr. C. A. Turner, the Official Assignee, as assignee of the estate and effects of Meheralli Mahomed Chinoy, Fazulbhoy Meheralli Chinoy and Goolam Husain Meheralli Chinoy, insolvents, the sum of Rs. 60,390-11-8 and further interest and costs, and they base their claim on three promissory notes, the first of which was dated the 5th of July, 1897, the second of which was dated the 2nd of August, 1897, and the third of which was dated the 25th of August, 1897, of all of which the plaintiffs were holders for value in due course and all of which are made in favour of the insolvent Meheralli Mahomed Chinoy and endorsed by him to the plaintiffs.

It appears that on the 2nd of August, 1897, Meheralli Mahomed Chinoy asked the plaintiffs, the Bank of Bombay, to advance him a further sum of Rs. 25,000, and with regard to that we have the uncontradicted testimony of Chunilal Dharamdas, the Assistant Bill Keeper in the Bank of Bombay, who says that on that occasion security was given by Meheralli Mahomed Chinoy, *viz.*, the title-deeds of the Bombay property; and further it appears that on the 25th of August, 1897, Meheralli Mahomed Chinoy and Goolam Husain Meheralli Chinoy asked the plaintiffs to advance on the third promissory note Rs. 20,000, and that on that occasion they deposited the title-deeds of the property at Mahábaleshvar and also gave a charge on the five shares of Rs. 500 each held by Meheralli Mahomed Chinoy in the Bank of Bombay, the certificate of which was handed to the Bank.

Mr. Chunilal has sworn that at the time of the second advance of Rs. 25,000 the deeds were taken as security for the Rs. 25,000, as well as the Rs. 15,000 which had been previously advanced, and it has also been proved before me that, as on the former occasion, when the deed of the Mábaleshvar property and share certificates were taken as further security they were so

(1) (1869) L. R., P.

(2) (1869) 3 Beng. L. R., 44 (A. C.); 11 Cal . R. 395.

taken as well for the Rs. 20,000 then advanced as for the loan of Rs. 25,000 and Rs. 15,000 already made by the plaintiffs.

The insolvents or rather Mr. C. A. Turner, as the Official Assignee and assignee of their estate and effects, has put in a written statement, and the minor defendant has also put in a written statement on his own account, and the material issue which I have to decide is whether by the alleged deposit of title-deeds any lien or charge in favour of the Bank was created in respect of any of the sums in the plaint referred to under the Presidency Banks Act or otherwise.

The first issue being whether the allegations in paragraphs 3 and 4 of the plaint are true, I must find that they are correct, there being no evidence whatever given to contradict that of Chunilal Dharamdas.

With regard to the second issue, a very important question indeed has been raised upon Act XI of 1876, the Presidency Banks Act, and that is whether, having regard to the terms of that Act, the Bank of Bombay have authority to lend money on the security of deposit of title-deeds of immoveable property.

It is difficult to conceive a question which is more important for the Bank, or in fact for the other Banks—the Bank of Madras and the Bank of Bengal—which are also governed by that Act.

Now before I deal with the sections which deal with the business to be done by the Bank, I must advert to the various definitions and sections referred to by Mr. Macpherson.

Section 3 defines "the Bank" as meaning "the Bank of Bengal, the Bank of Madras, or the Bank of Bombay (as the case may be) as constituted and regulated by this Act;" * * * "shareholders" means the duly registered holders from time to time of the shares of the Bank * * * and "directors" means the directors assembled for the purpose of performing any of their functions under this Act.

Then Chapter II deals with the constitution of the Bank, and section 5 in that chapter deals with the property, moveable and immoveable, securities, claims and demands to be vested in the Banks named respectively.

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Section 7 seems to me very material on this point. I will read the material parts of it: the Bank "may, as such body corporate, acquire and hold either absolutely or conditionally, for a term or in perpetuity, any property whatsoever, moveable or immoveable, and transfer, assign and convey the same."

That, therefore, authorizes the Bank to acquire and hold either absolutely or conditionally, for a term or in perpetuity, any property whatsoever, moveable or immoveable, and I apprehend that the deposit of title-deeds must be treated as a holding of immoveable property by the deposit of title-deeds, conditionally on the amount, for which they have been given as security, being repaid.

Then section 36 deals with the various business with which the Bank is concerned, and there is no doubt that it is to be noticed that there is no express authority here authorizing any one of these banks to do what is a matter, I apprehend, of almost daily occurrence in the history of any bank, namely, lending money on the deposit of title-deeds.

Section 36 deals with what they can do, and Mr. Macpherson, for the plaintiffs, relied upon sub-clause (*i*) of that section which includes in the business the Bank may do "the selling and realising of all property, whether moveable or immoveable, which may in any way come into the possession of the Bank in satisfaction or part satisfaction of any of the claims."

I must confess that it seems to me it could hardly be held that title-deeds deposited as security for a loan came within the definition of property come into the possession of the Bank in satisfaction or part satisfaction of any of its claims, as the word "satisfaction" and the word "security" seem to me to be two different things; but in sub-clause (*n*) we find these words "and, generally, the doing of all such matters and things as may be incidental or subsidiary to the transacting of the various kinds of business hereinbefore specified."

That is what is well known as the *ejusdem generis* clause in a memorandum of association, and I apprehend and it was not argued before me that a loan of money on deposit of title-deeds was not a matter or thing which was not incidental or subsidiary

to the various kinds of business specified, one of which is lending money. It seems to me, therefore, taking that section 7 as far as I have gone and sub-clause (*u*) of section 36, that the Bank is authorized to lend money on the deposit of title-deeds.

Section 37, which was most strongly relied upon on the part of the insolvents, reads thus:—"The directors shall not transact any kind of banking business other than those above specified, and in particular they shall not make any loan or advance (*a*) for a longer period than three months; or (*b*) upon the security of stock or shares of the Bank of which they are directors; or (*c*) upon mortgage or in any other manner upon the security of any immoveable property or the documents of title relating thereto; (*d*) nor shall they lend or advance by discount of bills or otherwise, to any individual or partnership firm (except upon the security mentioned in section thirty-six, paragraph (*a*), numbers (1) to (5) inclusive, any sums of money exceeding in the whole at any one time such sum as may be prescribed by the bye-laws for the time being in force." (This clause has been amended by section 5 of Act V of 1879, but it is immaterial for the present purpose.) And then the section goes on to say: "(*e*) nor shall they discount or advance and lend, or open cash credits on the security of any negotiable instrument of any individual or partnership firm, payable in the town or at the place where it is presented for discount which does not carry on it the several responsibilities of at least two persons or firms unconnected with each other in general partnership; (*f*) nor shall they discount or buy, or advance and lend, or open cash credits on the security of any negotiable security having at the date of the proposed transaction a larger period to run than three months, or if drawn after sight, drawn for a larger period than three months;" and then there is a provision with regard to the Bank of Madras with which we have no concern.

The first thing to be noticed with regard to this section is that the word used there is not the "Bank" but the "Directors". It is suggested that that was a slip on the part of the Legislature. I do not know, however, that I, sitting in this place, am entitled to say that words in an Act are there as the result of a slip. I apprehend that it is not for me to say that a word is there by

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slip, but to hold that it means what it says and consequently we see that this is a provision with regard to the directors and not with regard to the Bank. That appears to me to be a very important point when we come to deal with the cases on the point. It was argued that that section made any transactions not provided in it illegal. It certainly would be a most extraordinary thing if that argument is correct; for, if the directors of any of these three banks lent money for a longer period than three months, say three months and a day, the logical result would be that the transaction would be an illegal one which would justify the borrower in repudiating it, and similarly with regard to the other provisions in that section. Therefore, it appears to me that, upon the wording of that section itself, it is impossible to say that any dealings such as are there pointed out are illegal. As is pointed out in Palmer's Introductory Notes on the Memorandum of Association (Ed. 1888), "an *ultra vires* contract or transaction is not illegal in the sense that no right of action can arise in connection therewith. It is not, merely because it is *ultra vires*, to be regarded as *mala prohibitum* or *malum in se*—per Lord Cairns, *Ashbury Railway Carriage Iron Co.* v. *Riche*[1]. The contract is void, and no action can be brought on it, but the company can sue for the recovery of its assets wrongfully expended in relation to that contract—*G. E. Railway Co.* v. *Turner*[2]; *Coltman* v. *Coltman*[3]. And the directors and other parties implicated in the transaction may be sued in relation thereto, and may have rights of contribution *inter se.*" Therefore, one must draw a distinction between what the Legislature has said to be *ultra vires* the directors and what is illegal. Now, with regard to that point, there may be said to be four instructive cases, three of which were cited to me by Mr. Macpherson on the part of the plaintiffs.

The first one in point of date is the case of *Ayers* v. *South Australian Banking Co.*[4].

In that case the Australian Act No. 4 of 1855-56 enabled a proprietor of sheep to make a valid pledge of the wool of his next clip, although no possession was given. "A banking company incorporated by charter which contained a clause declaring that

(1) (1875) L. R., 7 H. L., 653.
(2) (1872) L. R., 8 Ch., 149.
(3) (1881) 19 Ch. D., 65.
(4) (1871) L. R., 3 P. C., 548.

it should not be lawful for the company to advance money on the security of merchandize, advanced money on the faith of receiving as security a preferential lien on the wool of an ensuing clip to be shorn from the sheep of the party in whose favour the advances were made, but who was not in the actual possession of the sheep, though a part owner of the sheep and the agent of the other owners for whose benefit the advances have been made:—Held in an action of trover by the company on such agreement giving them a preferential lien that the same was maintainable, and that the banking company were entitled to recover for the value of the wool on such preferential lien."

The suit was brought by the company for trover in respect of the wool, and one of the pleas was that they were not possessed of the wool, inasmuch as they were precluded from making this loan, and it was also argued that it was contrary to the terms of their charter which prohibited advances on merchandize, and that whatever might be rights of others, "the transaction being in violation of the bank charter, the respondents have no right to enforce it as it was *ultra vires*. *The National Bank of Australasia* v. *Cherry* is an authority to show that the powers of the bank charter should be strictly followed to entitle the respondents to the preferential lien they claim." As a matter of fact, in that case the Lords of the Privy Council said this: "Another objection was taken by Mr. Manisty on the terms of the charter—the clause in the charter which says it shall not be lawful for the Bank to make advances on merchandize. Now, unquestionably, a great many questions might be raised on the effect of that clause in the charter which may be of very great importance, but which also being of great difficulty, their Lordships do not think it necessary to give any opinion upon. There may be a question as to what are the transactions which come really within the clause, and whether this particular case does come within it. There may be also a question whether under any circumstances the effect of violating such a provision is more than this, that the Crown may take advantage of it as a forfeiture of the charter, but the only point which it appears to their Lordships is necessary to be determined in the present case is this, that whatever effect such a clause may have, it does not

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prevent property passing, either in goods or in lands, under a conveyance or instrument, which, under the ordinary circumstances of law, would pass it. The only defence which can be set up here (there is no plea of illegality) is under the plea of not possessed, that the right of property and the right of possession never passed to the plaintiffs. Their Lordships are of opinion, that whatever other effect it has, it cannot have the effect of preventing the property passing. If that were otherwise, the consequence might be most lamentable, because if the property never passed to them, they could not themselves convey any property to third persons. Transactions of the most honest description might be set aside. They might do what is a very common thing, make advances and take bills of exchange with the bills of lading attached. If it is to be said that the property in the goods mentioned in the bill of lading does not pass to them, then any purchaser to whom they might sell the goods under the bill of lading would get no title, and the original owner, who had received the full proceeds of the goods or a large advance upon them, might say, 'Oh, the property never passed to the South Australian Bank, and, therefore, it never passed to you.' Mr. Manisty admitted that he could find no authority for the proposition that any violation of such a condition of charter would prevent the property in goods passing to the person to whom an instrument, otherwise valid, professed to pass it, and their Lordships are of opinion that whatever other effect the violation of such a condition may have, it has not the effect of preventing the property in the goods passing or of preventing an action of trover being maintained if there is a wrongful conversion."

So their Lordships there held that that clause of the charter did not prevent the Bank taking the security offered for this loan.

Then comes the case which was referred to by Mr. Macpherson —that was a prior case—the case of *Taylor* v. *The Chichester, &c., Railway Company*[1]. The judgment of the minority in that case was upheld in the House of Lords and that of the majority reversed.

(1) (1867) L. R., 2 Exch., 356.

Consequently, the judgment of Lord (then Mr. Justice) Blackburn, who was in the minority, is worthy of every consideration. He points out what is the distinction between what may be *ultra vires* of the company and of the directors and what illegal, and then he says, at p. 379 : "But the Legislature, with a view to public policy, does sometimes expressly, sometimes by implication, prohibit the doing of certain acts by companies thus incorporated, and when an act is thus made *malum prohibitum*, any contract to do it is illegal ; and if there is an attempt made to enforce such a contract the defendant, whether a company or an individual, may, if his conscience permit him, set up the illegality to which he was a party ; for in *pari delicto potior est conditio defendentis*. Though every shareholder in the company had assented to the making of a particular contract, yet if the Legislature have, not merely for the protection of the shareholders but for the good of the public, forbidden the making of it, it is illegal, and the Corporation, whose shareholders have all assented, is in no worse position for raising the defence than the chairman of the company who has personally entered into the contract, and yet may, as was decided in *Macgregor* v. *Dores and Deal Railway Company*, set up the provisions of the Railway Acts as making his personal contract illegal. The question whether a particular thing is thus prohibited by the statutes must, in every case, depend upon the true construction of them. I think it is very unfortunate that the same phrase of '*ultra vires*' has been used to express both an excess of authority as against the shareholders and the doing of an act illegal, as being *malum prohibitum*, for the two things are substantially different ; and I think the use of the same phrase for both has produced confusion."

That, therefore, is the distinction we must bear in mind, *viz.*, whether the acts are *ultra vires* as regards the shareholders or *malum prohibitum* : because they must be treated as two entirely different things.

Another case which seems to me to support the view I take is reported in L. R. 8 Ch., Appeal 149, the *Great Eastern Railway Company* v. *Turner*. That was a case where "the chairman

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of a company, with the assent of the company held in his name shares in another company which had been purchased with the money of the first-named company. The chairman became bankrupt :—Held (reversing the decree of the Master of the Rolls) that, though the purchase by one company of shares in another company was illegal, the shares were not within the order and disposition of the bankrupt so as to pass to his assignees, and that he must transfer them as the company should direct;" and at page 152, Lord Selborne, L. C., says : "The directors are the mere trustees or agents of the company—trustees of the company's money and property—agents in the transactions which they enter into on behalf of the company. In this case without legal authority and, therefore, without the consent of the Corporation whose trustees and agents they were, the directors took a part of the company's money and therewith purchased a property which this contest proves to be of some value—shares in the Lynn Hunstanton Railway Company. Those shares so bought—not a farthing of any other person's money having contributed to the purchase—were placed in the names of three successive chairmen of the company, and were uniformly dealt with as that which they were, the property of the company. True it is that the investment was an unauthorized investment ; but I entirely assent to what was said by Sir Richard Baggallay that there is no difference between an unauthorized investment of the money of a public company by its trustees and an unauthorized investment of the moneys belonging to any other trust by the trustees of that trust. It would be monstrous—it would be extravagant to the very last degree—to say, that because the money of the *cestui que trust* has been laid out in an unauthorized manner, that, therefore, they are not to have the benefit of whatever value there is in the property bought with their money."

It seems to me that in this case it would be extravagant to the very last degree to say that because the money of the Bank of Bombay had been laid out in an unauthorized manner they are not to have the benefit of whatever value there is of the property bought with their money. To the same effect is

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the case of *In re Coltman, Coltman* v. *Coltman*[1]. That was a case of a loan out of the surplus funds of a friendly society by the trustees on the joint and several promissory notes of a person and his sureties who were not members of the society, and on the trustees claiming to prove against the estate of one of the sureties for the amount, Mr. Justice Fry, holding the transaction to be illegal, rejected the desired proof; and it was held on appeal that, as it was not alleged that the money was borrowed for an illegal purpose, the contract was not illegal, but merely unauthorized; that it was not competent to the makers of the note to allege by way of defence that the payees had no authority to lend the money, and that the proof, therefore, must be admitted. The Master of the Rolls, Sir G. Jessel, said:

"I am not satisfied that an express provision in the Act of Parliament that the trustees should not lend money upon personal security would have made any difference. The loan would have been wrong, it would have been an appropriation of the society's money to their own use, but there would not have been any such illegality in the transaction as would preclude the trustees from recovering the money lent. It seems to me that to hold it to be incompetent to maintain an action under those circumstances would be to say that it was incompetent for a trustee who had improperly appropriated the money of the society and lent it in his own name to take steps to enable him to restore it. How the persons who borrowed it, there being no illegality in the borrowing on their part, and no illegality in their agreeing to repay the money so borrowed and no illegality in the purpose to which they were intending to apply it, can set up the doctrine that they are relieved from their liability by reason of the money having originally belonged to a friendly society, is a thing which I am quite unable to understand."

And Mr. Justice Brett says:

"The only objection to this loan is that it was made without authority. But it does not seem to me that the borrower can set up as a defence to an action that the person who lent him the money, and to whom he has made a promise to repay that money, had no authority to lend it to him. That is an objection which it is not for him to take. The contract is, if you will lend me so much money I will pay you that money back on demand. The consideration is the handing over the money. That is not illegal. The promise to pay back money which you have borrowed is not illegal. The money was not borrowed for any illegal purpose, in order to do an illegal or immora thing, and I cannot see that there is anything illegal in the contract. The

(1) (1881) 19 Ch. Div., 64.

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only objection is, that those who made the contract with the debtor had no authority to make it, and that is an objection which he cannot take."

That seems to me to be particularly applicable to the present case where it is contended that it was illegal on the part of the directors to make this advance.

Then in another case reported in (1877) L. R. 2 App. Cas., 366, (the case of *Irvine* v. *Union Bank of Australia*,) it is not exactly in point, but it seems to me that the argument for the respondent in that case is apposite to that for the plaintiffs in the present case.

There Mr. Benjamin argued for the respondent that "the limitation in article 50 on the power of the directors, whether of borrowing or of mortgaging, was not a limitation of the powers of the company or of the whole body of the shareholders. It did not affect the constitution of the company; it simply restricted the agency of the directors. Consequently any act of the directors, whether of borrowing or of mortgaging in excess of their powers, could be ratified by the company; and such ratification was effected in accordance with the rules of the company so as to render the acts of the directors binding upon the company. Moreover, the excess of authority was a matter between the shareholders and the directors and did not affect the respondent." That argument was upheld by the Court of Appeal by whom it was held that the limitation in article 50 on the power of the directors, whether of borrowing or mortgaging, was not a limitation of the general powers of the company, and the acts of the directors in excess of their authority might be ratified by the company and so rendered binding.

An argument was raised on section 23 of the Contract Act wherein it is stated that "the consideration or object of an agreement is lawful unless it is forbidden by law, or is of such a nature that if permitted it would defeat the provision of any law." Now I apprehend that when you read the second clause of that section "or is of such a nature that if permitted it would defeat the provision of any law," you must read it with reference to the law with regard to which you are going to apply it, and if you find that the latter law contains a direction to a person to do

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certain things, it is difficult to say that it is to stand on the same footing as what is known as *malum prohibitum*. The effect of section 37 seems to me to be merely a restriction of the general powers of the directors of the bank, but which is consistent with the general purposes for which the bank was incorporated. If that be correct reading of the Act, then I apprehend that you cannot say that the second clause of section 23 of the Contract Act applies to that section (37). If the word in section 37 had been "Bank" instead of "Directors", there might have been a strong support to Mr. Raikes' argument on the case of the *National Bank of Australasia* v. *Cherry*[1]. But that case, which must have been before the Indian Legislature in 1876 (it having been decided in 1870), seems to me to suggest why the word "Directors" and not "Bank" was used in section 37.

It appears to me, therefore, having taken into consideration section 37 and other sections of Act XI of 1876, and the principles laid down in the cases I have referred to, and also the question of the applicability or non-applicability of section 23 of the Contract Act to the facts in question in this suit, I cannot see that the taking of title-deeds as security for the moneys advanced by the Bank, was in contravention of the provisions of Act XI of 1876, and I must, therefore, hold that the equitable security created by the deposit of the title-deeds made in the present case was a perfectly good and valid charge.

Then, with regard to the defendant Rahimbhoy Meheralli Chinoy, the only question with regard to him is as to costs.

I have read very carefully the correspondence annexed to his written statement, and it seems to me that the plaintiffs ought to pay his costs up to and including their attorney's letter of the 27th September, 1899, but that subsequently thereto he ought to bear his own costs, because, although the plaintiffs claim a personal decree against him in the plaint, they then gave him distinct notice that a personal decree was not claimed against him, "and if he has no interest in the firm of Fazulbhoy Meheralli Chinoy or its assets or in the properties in question in this suit," the decree to be taken herein obviously cannot affect him.

(1) (1870) L. R., 3 P. C., 299 (see p. 307, per Lord Cairns).

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Upon the issues I find the first, which is whether the allegations in paras. 3 and 4 of the plaint are true, in the affirmative; and the second, which is whether by the alleged deposit of title-deeds any lien or charge in favour of the Bank was created in respect of any of the sums in the plaint referred to under the Presidency Banks Acts or otherwise, also in the affirmative.

And I pass a decree for the plaintiffs against the defendant C. A. Turner as assignee of the estate and effects of the insolvents in the plaint mentioned.

The first defendant appealed, contending

(1) that the Bank was forbidden by Act XI of 1876 to advance money on security of immoveable property;

(2) that no valid lien was created in favour of the plaintiff Bank by the deposit of title-deeds having regard to Act XI of 1876; and

(3) that the lower Court ought to have held that the loans on a mortgage of immoveable properties advanced by the plaintiffs and their directors or secretary were forbidden by law and were of such a nature that if permitted they would defeat the provisions of law, and that the mortgage of immoveable property taken by them was unlawful.

*Branson* and *Raikes* for the defendant (appellant).

*Lang* (Advocate General) and *Macpherson* for plaintiffs (respondents).

The following authorities were cited:—Presidency Banks Act (XI of 1876), sections 36 and 37; *National Bank of Australasia* v. *Cherry*[1]; *Ayers* v. *S. A. Banking Co.*[2]; *G. E. Railway Co.* v. *Turner*[3].

JENKINS, C. J.:—This is a suit brought by the Bank of Bombay to realise certain securities and among them two equitable mortgages by deposit of title-deeds relating to immoveable properties.

The defendants are Mr. Turner, the Official Assignee of the mortgagors, and Ibrahimbhoy Hassumbhoy and Rahimbhoy Meheralli Chinoy, who have not appeared.

(1) (1870) 3 P. C., 299 at p. 307.
(2) (1871) 3 P. C., 548 at p. 559.
(3) (1872) L. R., 8 Ch. 149.

The facts for the purposes of this appeal are beyond dispute and are sufficiently stated in the plaint (His Lordship stated the facts and continued :—) The only defence with which we are concerned is Mr. Turner's contention that, having regard to the provisions of the Presidency Banks Act, 1876, the mortgages did not create a valid charge. Mr. Justice Russell held that this defence could not prevail, and accordingly passed a decree in the plaintiff's favour, and it is from this decree that the present appeal is preferred.

The Bank of Bombay is regulated by the Presidency Banks Act, 1876, and under it the Bank is authorized to carry on and transact the business of discountnig and buying bills of exchange and other negotiable securities payable in India, so that the transactions in the suit (apart from the securities that were taken) were within the Bank's power.

It is said, however, that the securities cannot be enforced, because it is provided by section 37 that the directors shall not transact any kind of banking business other than those specified above, and in particular they shall not make any loan or advance upon mortgage or in any other manner upon the security of any immoveable property or the documents of title relating thereto. Notwithstanding the argument advanced by the Advocate General to the contrary, it must, I think, be conceded that the discounting of bills is equivalent to making a loan or advance ; that appears to me to follow from the language of sub-section (*d*) of section 37, and it is with that view that I propose to approach the consideration of the case. Now it must be noticed that the expressed restriction contained in section 37 is on making any loan or advance upon mortgage of immoveable property and that the words of that section impose that restriction, not on the Bank but on its directors.

First, then, I will consider whether there is anything in this restriction which invalidates a charge on immoveable property created as a security for a *bonâ fide* liability already in existence. It seems to me that such a transaction does not answer the description of a loan or advance on a mortgage, and, therefore, it does not fall under the express prohibition on which alone the

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argument before us has been based. It is, however, still necessary to see whether there is anything else in the Act which would invalidate such a transaction. No doubt section 37 provides generally that "the directors shall not transact any kind of banking business other than those above specified," and it may be said that taking security for an existing liability is not expressly mentioned in section 36. But, then, section 36 merely specifies the several kinds of authorized business: it does not enumerate all the incidental details. Now I suppose that there can be no doubt that it would be an ordinary incident of a power to buy bills to take reasonable steps for the purpose of securing that the liability under those bills should on maturity be discharged; and it would seem equally clear that it would be a reasonable step for that purpose to take a security on immoveable property. Therefore, as it seems to me, in the absence of an express prohibition there would be nothing unlawful in the Bank so securing itself. I have already expressed the opinion that section 37 (*c*) does not apply, and I have indicated the reasons on which that conclusion is based; but, then, is there anything else in the Act which declares it to be illegal for the Bank to take a charge on immoveable property as a security for an existing loan? It clearly is not illegal for the Bank either to acquire or hold immoveable property either absolutely or conditionally: on the contrary this is expressly sanctioned (see section 7). It, therefore, seems to me that without infringing the provisions of the Act the Bank can acquire and hold immoveable property or an interest in it as a security for an existing liabilty; for it thereby acquires and holds an interest in immoveable property conditionally, the condition being the discharge of the liability. This is within the express words of section 7, and it also receives further countenance from section 36 (*i*) which cannot be explained as referring to proceedings in execution, inasmuch as in execution the sale or realisation is not by the party but by the Court.

If, then, a security on immoveable property to secure an existing debt is not illegal, it will follow that Mr. Turner's defence cannot succeed so far as the Rs. 15,000 are charged on the Bombay property or so far as this same Rs. 15,000 and the Rs. 25,000 are charged on the Mahábaleshvar property, for at the time of the

charge on the Bombay property the Bank were already holders of the note for Rs. 15,000 and before the charge on the Mahábaleshvar property they had in addition discounted the note for Rs. 25,000, nor does it, in my opinion, make any difference that neither note had actually matured. But it remains to be seen whether, apart from the special considerations applicable to the Rs. 15,000 and Rs. 25,000, the Bank's claim is sustainable.

As I have already remarked, section 37 in terms applies to the directors, and there can be no question that, as between the directors and the corporators, the directors would by virtue of section 37 (*c*) be liable for any loss resulting from the breach of its provisions; but the question is, whether the section has this further operation that the mortgagors can repudiate the obligation into which they purported to enter. I say the mortgagors, for, under the circumstances of this case, there is no reason to ascribe a more favourable position to the Official Assignee.

The appellant has contended that section 37 (*c*) does not merely regulate the management of the directors, but places a limit on the powers of the directors, so that a transaction which offends its provisions is *ultra vires* and incapable of enforcement in a Court of law. For this reliance has been placed on the *National Bank of Australasia* v. *Cherry*[1]. The actual decision in that case in no way helps the appellant, but the appellant seeks to support his argument by what was said by Lord Cairns in the course of the judgment. There, as here, the assignees contended that the Act regulating the Bank prevented the Bank making a valid contract for mortgage, and in reference to this question Lord Cairns said (His Lordship referred to pp. 306, 307 and 308 of the report and continued :—) It will, therefore, be noticed that Lord Cairns refrains from actually holding that the mortgage in that case was bad even if it was part of the contract of advance : he merely assumes that for the purpose of the argument, though no doubt the assumption appears to have been in accordance with the bent of his opinion. But even so, it has to be remembered that this opinion was as to the meaning of an Act wholly different in its phraseology from the present; for the

(1) (1870) L. R., 3 P. C., 299.

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prohibition under consideration was thus expressed: "Provided always that save as hereinbefore specially authorized it shall not be lawful for the said Corporation to advance or lend any money upon the security of lands or houses or ships."

The construction placed on such a clause affords little or no clue to the true interpretation of the statute with which we have to deal. Can it be said that the Bank, which has a general power to acquire and hold either absolutely or conditionally, did not acquire and are not entitled to a charge on this land? It seems to me that the Act does not prevent the actual acquisition by the Bank of the charge, though no doubt the directors acted in breach of their duties. Reading through whole of the section 37, it appears to me that it is concerned with the mode in which the directors were to conduct the business in the interests of the Bank, and did not impose the prohibition in obedience to any principle of public policy dictated by the public interest. Thus it can hardly be supposed that a loan or advance in breach of the conditions indicated in sub-section (*d*) or (*e*) would leave the Bank without remedy and at the same time sub-section (*b*) is strongly suggestive of the view that section 37 merely lays down rules for the guidance of the Bank, and that it is outside its scheme that the non-observance of those rules should prejudice the interests of the Bank or that what is designed for its protection should act to its prejudice. In this connection, I would refer to the language of Lord Selborne in the *G. E. Railway Co.* v. *Turner* [1]: "True it is that the investment was an unauthorized investment; but I entirely assent to what was said by Sir Richard Baggallay, that there is no difference between an unauthorized investment of the money of a public company by its trustees and an unauthorized investment of the moneys belonging to any other trust by the trustees of that trust. It would be monstrous—it would be extravagant to the very last degree—to say that because the money of *cestuis que trust* has been laid out in an unauthorized manner, that, therefore, they are not to have the benefit of whatever value there is in the property bought with their money." So again in *Coltman* v. *Coltman* [2] Sir George Jessel said: "I am not satisfied that an express provision in the Act of Parlia-

(1) (1872) L. R., 8 Ch. 149 at p. 152. (2) (1881) 19 Ch. D. at p. 69.

ment that the trustees should not lend money upon personal security would have made any difference. The loan would have been wrong, it would have been an appropriation of the society's money to their own use, but there would not have been any such illegality in the transaction as would preclude the trustees from recovering the money lent. It seems to me that to hold it to be incompetent to maintain an action under those circumstances would be to say that it was incompetent for a trustee, who had improperly appropriated the money of the society and lent it in his own name, to take steps to enable him to restore it. How the persons who borrowed it, there being no illegality in the borrowing on their part, and no illegality in their agreeing to repay the money so borrowed, and no illegality in the purpose to which they were intending to apply it, can set up the doctrine that they are relieved from their liability by reason of the money having originally belonged to a friendly society, is a thing which I am quite unable to understand."

While at p. 70 Brett, L. J., says: "The only objection to this loan is that it was made without authority. But it does not seem to me that the borrower can set up as a defence to an action that the person, who lent him the money and to whom he has made a promise to repay that money, had no authority to lend it to him. That is an objection which it is not for him to take. The contract is, if you will lend me so much money, I will pay you that money on demand. The consideration is the handing over the money. That is not illegal. The promise to pay back money which you have borrowed is not illegal. The money was not borrowed for an illegal purpose, in order to do an illegal or immoral thing, and I cannot see that there is anything illegal in the contract. The only objection is, that those who made the contract with the debtor had no authority to make it, and that is an objection which he cannot take."

For these reasons I am of opinion that the defence based on alleged illegality must fail and that the securities are enforceable.

But while I come to this conclusion, I think it right to point out that the directors run considerable risk by entering into a transaction of this class and that they should in future bear this

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in mind. The appeal, therefore, will be dismissed and the decree of the lower Court affirmed with costs.

Attorneys for plaintiffs:—Messrs. *Crawford, Brown & Co.*

Attorneys for defendants:—Messrs. *Daftary and Ferreira.*

## APPELLATE CIVIL.

*Before Mr. Justice Parsons and Mr. Justice Ranade.*

1900.
*April* 3.

BALAMBHAT (ORIGINAL DEFENDANT No. 3), APPELLANT, *v.* NARAYANBHAT (ORIGINAL PLAINTIFF), RESPONDENT.*

*Res judicata—Co-defendants—Decision in previous suit in which parties were co-defendants, when binding—Such decision not binding when one defendant was only a nominal party.*

A judgment in a previous suit is not *res judicata* as between co-defendants so as to bar a subsequent suit brought by one of them, unless there was a conflict of interest between them and the judgment determines the real rights and obligations of the defendants *inter se*.

Such previous judgment is not *res judicata* when the plaintiff in the subsequent suit was only a nominal party in the prior suit.

APPEAL against the order of F. C. O. Beaman, District Judge of Belgaum, remanding a suit for trial on the merits to the Court of Ráo Sáheb C. R. Karkare, Subordinate Judge of Athni.

The plaintiff Narayanbhat mortgaged the land in question to one Gundabhat, who in 1895 sued on the mortgage and obtained a decree for possession. When, however, he proceeded to execute the decree, he was obstructed by Narayanbhat's brother, Balambhat, who claimed to be owner of a half share of the land. The Court thereupon under section 331 of the Civil Procedure Code (Act XIV of 1882) registered Balambhat's objection as a suit (No. 581 of 1896) in which Gundabhat the mortgagee was made plaintiff and Balambhat and Narayanbhat (the present plaintiff) were made defendants. This suit was apparently not contested, and a decree was passed in April, 1897, awarding only half the land to Gundabhat.

While that suit was pending, Narayanbhat filed this suit (No. 669 of 1896) against Gundabhat (the mortgagee) and Balam-

*Appeal, No. 2 of 1900, from order.

bhat, praying for an injunction restraining them from obstructing him in the enjoyment of the land, alleging that it belonged to him and was in his possession, and that the defendants interfered with his enjoyment.

Gundabhat did not appear, but Balambhat pleaded that the land belonged to him and the plaintiff jointly, and that he was entitled to a half share.

The Subordinate Judge framed issues and took evidence, but without recording findings on the issues, held that the plaintiff's claim was *res judicata* by the decree in Suit No. 581 of 1896, and that not being the exclusive owner of the land, he was not entitled to the injunction.

On appeal by the plaintiff the Judge found that the plaintiff had only been a nominal party to Suit No. 581 of 1896 and he remanded the case for the Subordinate Judge to find on the issues.

Against this order of remand, Balambhat now appealed.

*Mahadev V. Bhat*, for the appellant (Balambhat) :—This suit was rightly dismissed by the Subordinate Judge and the case ought not to have been remanded by the Appellate Court. In Suit No. 581 of 1896 we contended that we had a moiety in the land, and that the present plaintiff Narayanbhat owned the other moiety. The Court thereupon raised an issue as to the interest which passed to Gundabhat under the mortgage-deed passed by Narayanbhat. The finding on that issue was that Gundabhat should recover possession of a moiety of the property, and he was ordered to pay our costs. We contend that, in order to award relief to Gundabhat in that suit, it was absolutely necessary to determine the rights of the defendants, Balambhat and Narayanbhat, *inter se*, in that suit. The Court found that Narayanbhat was the owner of a moiety and the other moiety belonged to Balambhat. That decision operates as *res judicata* in the present suit—*Ramchandra* v. *Narayan* [1]; *Venkayya* v. *Narasamma* [2] ; *Madhavi* v. *Kelu* [3] ; *Ahmad Ali* v. *Najabat Khan* [4]. These rulings establish the proposition that when there is active controversy between defend-

(1) (1886) 11 Bom., 216.
(2) (1887) 11 Mad., 204.
(3) (1892) 15 Mad., 264
(4) (1895) 18 All., 65.

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ants *inter se* and in order to award relief to the plaintiff it is necessary to adjudicate on their rights and obligations, the decision operates as *res judicata* between them in a subsequent suit.

*Gokuldas K. Parekh*, for the respondent (Narayanbhat):—As we instituted the present suit soon after the Suit No. 581 of 1896 was registered, we did not make any defence to that suit. Narayanbhat was only a nominal party to that suit, which related to the removal of the obstruction caused by Balambhat There was no conflict of interest between the defendants in the former suit and there was no decision defining their rights *inter se*. That decision, therefore, cannot operate as a bar to the present suit.

PARSONS, J.:—The only point for consideration in this appeal relates to the question of *res judicata*. So far as the facts relate to this point, they appear to be beyond dispute. One Gundabhat obtained a decree in 1895 on a mortgage-bond executed by the present plaintiff-respondent Narayanbhat for possession of the mortgage property. When he went to take possession, the present appellant Balambhat obstructed the delivery of possession on the ground that he was owner of a moiety of the property. The objection was allowed by the Court, which registered the objection as a Regular Suit No. 581 of 1896, in which Gundabhat was made plaintiff, and Balambhat and Narayanbhat were made defendants. Narayanbhat put in no defence, and Gundabhat also gave no evidence, and thereupon a decree was passed awarding only half the property to Gundabhat. This decree was passed on 14th April, 1897.

Shortly after the registration of this suit, No. 581 of 1896, Narayanbhat brought a separate suit, No. 669 of 1896, in which he claimed an injunction to restrain both Gundabhat and Balambhat and a third person from obstructing his enjoyment of the entire land. The Court of first instance, relying on its decision of the previous suit, No. 581 of 1896, held that the present Narayanbhat's claim in the suit for injunction was *res judicata* by the decision in the previous suit. In appeal the District Judge held that the decision in the previous suit did not operate as *res judicata*, because Narayanbhat was only a nominal party in the previous

suit, and no determination of his rights as against Balambhat had been made in that suit. He accordingly remanded the case for inquiry on the merits.

The present appellant Balambhat contends before us that the decision in the previous suit did operate as *res judicata*. The question thus turns entirely on the inquiry whether Narayanbhat was a nominal party in the previous proceeding, or whether the decision in that suit determined his right as against the appellant Balambhat. The leading case on the subject is *Ramchandra* v. *Narayan* (1). It will be seen that in the old suit both Narayanbhat and Balambhat were co-defendants, and the general rule laid down by Sir Raymond West on the subject of *res judicata* as between co-defendants is that "without necessity the judgment will not be *res judicata* unless there was a conflict of interests amongst the defendants, and the judgment defines the real rights and obligations of the defendants *inter se*." In the present case there was no such determination of rights and obligations as between Balambhat and Narayanbhat in the previous proceeding. Narayanbhat, having simultaneously instituted a separate suit, apparently did not care to defend his interests in the suit brought by Gundabhat against him and Balambhat. Gundabhat's claim was only on a mortgage-bond, and he sought to recover possession as mortgagee. Gundabhat did not apparently care also to assert Narayanbhat's rights as against Balambhat, for he gave no evidence. To all intents and purposes, therefore, Narayanbhat was only a nominal party in Gundabhat's suit No. 581 of 1896. Narayanbhat was under no obligation to make any defence in Gundabhat's suit, as he had brought a separate suit. He was, in fact, not a necessary party to that suit, which was to remove obstruction caused by Balambhat. In such a case the unnecessary co-defendant is only a nominal party, and he is not precluded from bringing a suit against the other defendants to assert his rights.

In *Brojo Behari Mitter* v. *Kedar Nath* (2), the distinction is pointed out between formal and necessary defendants. In that case the landlord was made a nominal defendant in a suit brought against his tenant by another tenant of the same landlord who sued for

(1) (1886) 11 Bom., 216. (2) (1886) 12 Cal., 580.

1900.

BALAMBHAT v. NARAYAN-BHAT.

possession. It was held that the decision in favour of the tenant plaintiff against the other tenant did not operate as *res judicata* in a subsequent suit brought by the landlord against the first tenant. The tests by which a nominal and a necessary party may be distinguished are laid down in *Ahmad Ali* v. *Najabat Khan* (1), in which the Allahabad Judges followed the decision in *Ramchandra* v. *Narayan* noted above. There must be a conflict of interests among the defendants, and the judgment must define the real rights and obligations of the defendants *inter se*. Where the question about the family being joint or divided had not been determined in the previous suit as between the defendants *inter se*, but simply as against the plaintiff who was a stranger, the decision did not operate as *res judicata* when one of the defendants sued the other on the ground that the family was joint—*Bhagwant Singh* v. *Tej Kuar* (2). This was also the view taken by the Madras High Court in *Ramanuja* v. *Narayana* (3).

On the strength of these rulings it seems clear that the District Judge very properly held that the decision in Gundabhat's suit No. 581 of 1896 did not preclude the respondent-plaintiff Narayanbhat from bringing his present suit against Balambhat and Gundabhat. We, therefore, confirm the order of the lower Court and dismiss the appeal with costs.

*Order confirmed.*

(1) (1895) 18 All., 65. (2) (1885) 8 All., 91.
(3) (1893 & 1895) 18 Mad., 374.

## APPELLATE CIVIL.

*Before Mr. Justice Candy, Acting Chief Justice, and Mr. Justice Ranade.*

1900. *July 5.*

VITHAI (ORIGINAL PLAINTIFF), APPELLANT, *v.* HARI (ORIGINAL DEFENDANT), RESPONDENT.*

*Limitation Act (XV of 1877), Art. 91—Suit to cancel a document—Cause of action.*

Where a plaintiff sought for the cancellation of a mortgage-bond and for possession of the mortgaged property, alleging that the mortgage was a sham transaction and that she, the plaintiff, had subsequently remained in possession and had only been dispossessed within three years before suit,

* Second Appeal, No. 800 of 1899.

1900.

VITHAI v. HARI.

*Held*, that if the plaintiff's allegations as to remaining in possession were true, the period of limitation for the suit could not be computed from the date of the mortgage-bond as provided in article 91 of the Limitation Act (XV of 1877).

*Janki Kunwar* v. *Ajit Singh*(1) distinguished.

SECOND appeal from the decision of Ráo Bahádur Chunilal Maneklal, Joint First Class Subordinate Judge, A. P., of Sátára.

Plaintiff had been the mistress of defendant. She alleged that on 21st December, 1889, she had executed to defendant a registered mortgage-bond purporting to mortgage her property for Rs. 1,000; that the mortgage was a sham transaction; that she had remained in possession of the property till 1895, when she was dispossessed by the defendant of two fields forming part of the property comprised in the mortgage.

This suit was filed in 1897 to recover possession of the fields and for a declaration that the mortgage-bond was void.

It appeared that in 1892 the defendant had brought a possessary suit in the Mámlatdár's Court against the plaintiff and certain tenants of the land, and had obtained a decree in July of that year. Defendant contended (*inter alia*) that the suit was barred by limitation.

The Court of first instance disallowed this contention and awarded plaintiff's claim.

On appeal, the Subordinate Judge, A. P., held that the suit was barred under article 91 of the Limitation Act (XV of 1877), which provides that a suit to cancel or set aside an instrument must be brought within three years from the time when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him. He, therefore, reversed the decision of the Court of first instance and dismissed the suit.

Against this decision plaintiff preferred a second appeal to the High Court.

*M. B. Chaubal*, for appellant.

*N. G. Chandavarkar*, for respondent.

CANDY, C. J. (ACTING):—The only question before us relates to limitation. Plaintiff, who had been the mistress of defendant,

(1) (1887) 15 Cal., 58.

alleged that on 21st December, 1889, she had executed to him a registered mortgage-bond purporting to mortgage her property for Rs. 1,000; but the same was a sham transaction, no consideration or possession having passed. She remained in possession till 1895, when defendant wrongfully took possession of the two fields which were part of the property included in the mortgage-bond. Hence this suit to recover possession of the two fields and for a declaration that the mortgage-bond was void. The defence was that the mortgage was a real transaction accompanied with consideration and change of possession.

The Subordinate Judge in the Court of first instance found o the question of limitation, following the decision in the case of *Ikram Singh* v. *Intizam Ali*[1], that the limitation of twelve years was applicable; and on the merits he decided in favour of the plaintiff.

On appeal to the District Court the Subordinate Judge, A. P., summarily disposed of the case on the point of limitation, holding that the question before him was concluded by the Privy Council ruling in *Janki Kunwar* v. *Ajit Singh*[2]. He, therefore, held that the suit was barred under article 91 of the Limitation Act: also that it was barred as not being brought within three years from the date of the Mámlatdár's decree. A copy of this decree of the Mámlatdár was produced for the first time in the lower Appellate Court; and there has been no examination of the parties regarding the circumstances relating to that decree. It is dated July, 1892, and purports to be given in a possessory suit filed by the present defendant against the present plaintiff and certain tenants. A copy of the present plaintiff's deposition in that suit was also filed in the Court of first instance; but it is impossible from the record, as it now is, to say whether that was a *bonâ fide* suit for possession, or whether the then plaintiff as the registered mortgagee was merely the then first defendant's nominee in order to eject the tenants.

With regard to article 91 of the Limitation Act, it is clear that the Subordinate Judge, A. P., was mistaken in simply relying on the Privy Council case quoted by him. That was a case

(1) (1884) 6 All., 260.

(2) (1887) 15 Calc., 58; S. C. L. R., 14 I. A., 148.

in which the executant of the deed in question, which had been acted on from the date of execution, sued to obtain a cancellation of the same and to recover possession of the properties.

That is different from the present case, in which it is alleged that the mortgage-deed was not acted on, but that the plaintiff remained in possession of the property till 1895. There is no finding on this allegation of possession, and so it is impossible for us to come to a definite conclusion on the question of limitation. It is obvious that if plaintiff's allegations are correct, then a period of limitation of three years cannot run from the date of the execution of the document. Otherwise it would always be open to a sham mortgagee or vendee to wait for three years from the date of the execution of the document, and then with impunity he could seize the property, and the real owner of the property would be helpless (*Cf.* the remarks of Muttusami Ayyar, J., in *Sundaram* v. *Sithammal* (1)). Admitting that the plaintiff seeking to recover possession against an instrument executed by herself must first obtain the cancellation of the instrument, and that the three years' limitation enacted by article 91 applies, the period cannot be calculated from the date of the bond. But we are not in possession of the facts; and the Judge in the lower Appellate Court made no attempt to ascertain the facts. We must, therefore, reverse his decision and remand the appeal for a fresh decision. If necessary, the lower Appellate Court will call for further evidence. Costs to abide the result.

*Case remanded.*

(1) (1892) 16 Mad., 311 at p. 315.

## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

1900. *July* 6.

PURUSHOTTAM DAYARAM AND ANOTHER (ORIGINAL DEFENDANTS NOS. 3 AND 4), APPELLANTS, *v.* CHATARGIR GURU ARJUNGIR (ORIGINAL PLAINTIFF), RESPONDENT.*

*Mámlatdárs' Courts Act (Bom. Act III of* 1876), *Sec.* 13(1)—*Limitation Act (XV of* 1877), *Sch. II, Art.* 47—*Possessory suit—Mámlatdár's Court.*

In a possessory suit instituted in a Mámlátdar's Court neither the plaintiff nor the defendant appeared at the hearing. The case was, therefore, disposed of by the Mámlatdár under the first part of section 13 of the Mámlatdárs' Courts Act (Bombay Act III of 1876).

*Held*, that the order of the Mámlatdár was an order rejecting the plaint.

A regular suit for possession having been brought in a Civil Court more than three years after the above order of the Mámlatdár,

*Held* that the suit was time-barred under article 47, Schedule II of the Limitation Act (XV of 1877).

SECOND appeal from the decision of Ráo Bahádur Vaman M. Bodas, First Class Subordinate Judge of Dhulia with appellate powers, confirming the decree of Ráo Sáheb S. B. Upasani, Subordinate Judge of Bhusával.

The plaintiff brought this suit in the year 1897 to recover possession of certain lands, alleging that his *guru* (preceptor) had purchased them from one Ganu Hanmanta and had let them to one Devsing Bhivsan for cultivation, and that, after the expi-

* Second Appeal, No. 57 of 1900.

(1) Section 13 of the Mámlatdárs' Courts Act (Bom. Act III of 1876):—

**13.** If the plaintiff fails to attend with his proofs, or omits to adopt measures to procure the attendance of his witnesses on the day and at the place appointed, the Mámlatdár shall reject the plaint with costs.

If the defendant fails to attend, and the Mámlatdár is satisfied from the evidence before him that the notice has been duly served on the defendant, and in sufficient time to enable the defendant to appear and answer on the day fixed in the notice, he shall proceed to hear the plaint *ex parte*.

Provided that if either party satisfy the Mámlatdár at any time within 15 days from the date of the plaint being thus rejected, or of such *ex-parte* decision, that he was prevented by some unavoidable circumstance from being present, or from procuring the attendance of his witnesses, it shall be lawful for the Mámlatdár to re-hear the case, a notice in the form of Schedule B being issued, at the applicant's expense, to the opposite party

ration of the term of the tenancy, Devsing, instead of vacating the lands in plaintiff's favour, allowed the defendants to take possession of them; that the defendants were thus in wrongful possession, and though they had been required to vacate the lands on the 1st June, 1897, they had refused to do so.

The defendant No. 1, Ganu Hanmanta, did not appear.

Defendant No. 2 pleaded that the lands in suit did not belong to the vendor of the plaintiff's *guru* and had never been in his or the plaintiff's possession, and that they really belonged to Purushottam and Ambaram Dayaram, from whom he held as their tenant.

Defendants Nos. 3 and 4 pleaded that the plaintiff had filed a possessory suit against Devsing Bhivsan in the Mámlatdár's Court; that the said suit having been dismissed by the Mámlatdár on the 16th May, 1893, the present suit, which was not filed within three years from the date of the Mámlatdár's order, was barred by limitation; that the lands in suit belonged to Devsing Bhivsan, from whom they had been purchased by the defendants on the 17th February, 1894, and that they (the defendants) had been in possession as owners since the purchase.

The Subordinate Judge found (*inter alia*) that the suit was not time-barred, not being governed by article 47, Schedule II of the Limitation Act, inasmuch as the possessory suit was struck off the file by the Mámlatdár owing to the absence of both the parties on the day of hearing, and that the lands in suit belonged to the plaintiff. He, therefore, allowed the claim.

On appeal by the defendants the Judge confirmed the decree.

Defendants Nos. 3 and 4 preferred a second appeal.

*H. C. Coyaji*, for the appellants (defendants Nos. 3 and 4):—The plaintiff's suit in the Mámlatdár's Court was Suit No. 13 of 1893. In that suit the plaintiff's claim was rejected. As the present suit was not brought within three years from the date of the Mámlatdár's order in that suit, it is time-barred under article 47, Schedule II of the Limitation Act—*Gulabbhai* v. *Kasanji*[1]; *Ramchandra* v. *Bhikibai*[2].

(1) P. J., 1897, p. 246. (2) (1882) 6 Bom., 477.

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*Uttamram Lallubhai*, for the respondent (plaintiff) :—In the possessory suit the Mámlatdár made no order. as to the possession of the land. Article 47, Schedule II of the Limitation Act contemplates such an order being made and is, therefore, not applicable. On the day of hearing both the parties being absent, the Mámlatdár did not consider the issues which had been raised under section 15 of the Mámlatdárs' Courts Act. There was no inquiry at all either formal or on the merits of the case. In *Ramchandra* v. *Bhikibai*[1] the suit was dismissed on account of the non-appearance of the plaintiff. The ruling in *Gulabbhai* v. *Kasanji*[2] is also distinguishable. In that case, both the suits were filed in the Mámlatdár's Court, while in the present case, the second suit, that is, the present one, was filed in the Subordinate Judge's Court. Section 13 of the Mámlatdárs' Courts Act makes no provision for a case in which both the parties are absent, while section 99 of the Civil Procedure Code has provided for that contingency. We submit that as there was no adjudication by the Mámlatdár with respect to the right of possession, his order merely rejecting our plaint cannot operate as a bar to our present suit.

RANADE, J. :—This case has been distinguished by the Courts below from the decision in *Ramchandra* v. *Bhikibai*[1], on the ground that the dismissal in this last case was on account of the non-appearance of plaintiff alone, whereas in the present case both the parties appear to have put in no appearance in the Mámlatdár's Court. It appears to us that this circumstance does not establish any real distinction between the two cases. Section 13 of the Mámlatdárs' Courts Act contains no provision for cases where both parties do not appear. It provides first for cases where plaintiff fails to appear or keep his evidence ready, and it directs that in such cases, an order of rejection shall be made. It next provides for cases where defendant fails to appear, and, on proper proof of service, it empowers the Mámlatdár to pass an *ex-parte* decree. The section next provides for a re-hearing of the suit in both classes of cases on proper application being made within a time fixed.

(1) (1882) 6 Bom., 477. (2) P. J., 1897, p. 246.

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The present case is expressly stated to have been disposed of by the Mámlatdár under the first part of section 13; and it is clear that an order of rejection under section 13 was made. The decision in *Gulabbhai* v. *Kasanji*[1] governs the present case. It was stated in the judgment in that case that section 13 does not distinguish between cases where defendant appears and where he does not appear. The parties to the present suit admittedly represent the parties to the suit before the Mámlatdár; and as the present suit was brought more than three years after the date of the Mámlatdár's order of rejection, the claim must be held to be barred under article 47 of the Limitation Act.

We must, therefore, reverse the decrees of the Courts below and reject the claim with costs on the respondent throughout.

*Decrees reversed and claim rejected.*

(1) P. J. for 1897, p. 246.

## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

ANTONE (ORIGINAL DEFENDANT No. 3), APPELLANT, *v.* MAHADEV ANANT (ORIGINAL PLAINTIFF), RESPONDENT.*

1900. *July* 10.

*Mesne profits, suit for—Nature of suit—Jurisdiction—Appeal—Provincial Small Cause Courts Act (IX of* 1887), *Sch. II, Cl.* 31.

The plaintiff purchased certain land in June, 1892, at a sale in execution of a decree against R. He did not obtain formal possession until June, 1894. The defendant was in actual possession of the land under an alleged private sale by R. to him in October, 1892. The plaintiff now sued the defendant for mesne profits for three years, *viz.*, from 1894 to 1896, alleging that they had been wrongfully received by the defendant.

*Held*, that the suit fell within the exception of clause 31 of Schedule II of the Provincial Small Cause Courts Act (IX of 1887) and was not of a nature cognizable by Courts of Small Causes, and that, therefore, an appeal lay to the District Court from the Court of the Subordinate Judge.

SECOND appeal from the decision of H. L. Hervey, District Judge of Kánara, reversing the decree of Ráo Bahádur Jayasatya Bodhrav Tirmalrao, First Class Subordinate Judge of Kárwár.

* Second Appeal, No. 79 of 1900.

1900.

ANTONE v. MAHADEV ANANT.

Suit for mesne profits for three years, *viz.*, from 1894 to 1896.

On the 17th June, 1885, Ramchandra Subba mortgaged the lands in question to one Mattas, the father of defendants Nos. 2 and 3 (Reuben and Antone). Mattas died and on the 12th July, 1885, Reuben (defendant No. 2) sub-mortgaged the land to Chandru. In 1890, Chandru sued on his mortgage and obtained a decree, in execution of which the land was attached and sold on the 13th June, 1892, and was purchased by the plaintiff, who obtained formal possession on the 2nd June, 1894.

In the meantime, *viz.*, on the 6th October, 1892, Reuben and Antone (defendants Nos. 2 and 3) privately sold the land to one Sadashiv Narayan (defendant No. 1) and gave him actual possession.

The plaintiff brought the present suit against Sadashiv, Reuben and Antone for the profits of three years from 1894 to 1896.

The Subordinate Judge dismissed the suit against all the defendants, holding that the plaintiff's rights under his purchase at the execution sale were not superior to those of Sadashiv (defendant No. 1), the latter also having got possession without notice of the plaintiff's purchase.

In appeal the District Judge held that Reuben and Antone (defendants Nos. 2 and 3) were liable to the plaintiff, but not Sadashiv (defendant No. 1).

Antone (defendant No. 3) preferred a second appeal.

It was contended on his behalf that the District Court ought not to have heard the appeal; that it had no jurisdiction, as the suit was one cognizable by the Small Cause Court.

*Ghanasham N. Nadkarni*, for appellant (defendant No. 3).

*Shamrao Vithal*, for respondent (plaintiff).

RANADE, J.:—The first contention raised in this appeal relates to the question of jurisdiction. It was urged by Mr. Ghanasham, the appellant's pleader, that this suit was cognizable by a Court of Small Causes, and as such the decision of the First Class Subordinate Judge was final, and not open to appeal in the District Court. The original suit was brought by the plaintiff-respond-

ent to recover Rs. 75 on account of the profits of certain lands wrongfully received by the defendants.

The plaint stated that the lands belonged to one Ramchandra, who mortgaged them to the father of defendants Nos. 2 and 3 in 1885. Defendant No. 2 sub-mortgaged the lands to one Chandru, and Chandru obtained a decree on the sub-mortgage, and in execution of that decree the lands were sold and purchased by the plaintiff-respondent on 13th June, 1892. Plaintiff obtained formal possession through Court on 2nd June, 1894. In the meanwhile, defendant No. 1 had become a private purchaser of these lands under a deed of purchase dated 6th October, 1892, and he obtained possession and retained the same, notwithstanding the formal possession given to the plaintiff in 1894.

The present claim was brought by the plaintiff for the profits of three years from 1894 to 1896, and he sought to recover them from all the three defendants, namely, the private purchaser defendant No. 1, and his vendors defendants Nos. 2 and 3, or from whichever of them were held liable. The first Court held that plaintiff's rights under the auction purchase were not superior to those of defendant No. 1, who was previously in possession, and had no notice of the auction-purchase, and plaintiff's claim was accordingly dismissed against all defendants. In appeal the District Judge held that defendants Nos. 2 and 3 were liable to plaintiff's claim, but not defendant No. 1. The second appeal was brought by defendant No. 3, who contended that the District Court had no jurisdiction to entertain the appeal, as the suit was of a nature cognizable by Courts of Small Causes.

The first question for enquiry is whether the suit falls under clause 31[1] of Schedule 2 of Act IX of 1887. The latter part of that clause excepts from the cognizance of Provincial Small

(1) Provincial Small Courts Act (IX of 1887), Schedule II, clause 31—(Suits excepted).

* * * * * * *

"31 Any other suit for an account, including a suit by a mortgagor, after the mortgage has been satisfied, to recover surplus collections received by the mortgagee, and a suit for the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant; * *

* * * * * * *"

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Cause Courts, suits for an account, including suits for the profits of immoveable property belonging to the plaintiff, which have been wrongfully received by the defendants. The plaint shows that defendant No. 1 claimed to have purchased the lands from the other defendants in October, 1892, after the date of plaintiff's auction-purchase of June, 1892, but before plaintiff was formally placed in possession in June, 1894. Defendant's possession was thus in adverse right and he received the profits for three years wrongfully within the meaning of clause 31. Following several previous decisions, it was held by the Calcutta High Court in *Sriram Samanta* v. *Kalidas Dey*[1] that suits for mesne profits of lands of which the plaintiff had been dispossessed fell under the exception laid down by clause 31. The appellant's pleader, however, relied chiefly on the Full Bench decision of the same Court in *Kunjo Behary Singh* v. *Madhub Chundra Ghose*[2], in which the previous decisions on the subject were considered by the Judges who differed in their views. The majority of the Judges (5 against 2) held that a suit for mesne profits was really a claim for damages for trespass, and such claims of damages did not fall under clause 31, which only applies to suits for an account of moneys which the defendant had wrongfully received, and to which the plaintiff was entitled. The majority of the Judges thought that the decision in *Sriram Samanta* v. *Kalidas Dey*[3] was not correct. On the other hand, the minority, consisting of Ghose and Bannerji, JJ., were of opinion that, though a suit for mesne profits was not necessarily a suit for accounts, yet in such suits accounts might have to be examined and that, therefore, clause 31 was applicable.

In this conflict of opinion, it becomes necessary to examine the course of decisions of our own High Court. The cases decided under section 6 of Act XI of 1865 cannot be accepted as guides at present, since the whole of the frame-work of the Act of 1837 differs essentially from the old Act on this point—*Khandu* v. *Tatia*[4] and *Kakaji Sakharam* v. *Govind Ganesh*[5]. The decision in *Jamnadas* v. *Bai Shivkor*[6] was passed under somewhat

(1) (1891) 18 Cal., 316.
(2) (1896) 23 Cal., 884.
(3) (1891) 18 Cal., 316.
(4) (1871) 8 Bom. H. C. R., 23. (A.C.)
(5) (1871) 8 Bom. H. C. R., 96. (A.C.)
(6) (1881) 5 Bom., 572.

peculiar circumstances. Though the claim was in form one for damages for use and occupation, yet the Court held that the action was really brought to try the question of title, and it was, therefore, held that the Small Cause Court had no jurisdiction. In *Damodar Gopal* v. *Chintaman Balkrishna*[1] Sargent, C. J., held that a claim for a share in the profits of an inám village would fall under clause 31 if plaintiff had alleged in his plaint that the defendants had wrongfully received the profits. Where there was no such allegation, the claim must be regarded as one for money had and received, and the suit did not fall under clause 31. A distinction was thus made between cases where defendants had rightfully received, but wrongfully retained the profits, from others in which, as in the present case, defendant has from the first wrongfully received the profits. In a later case—*Shankar Trimbak* v. *Damodar*[2]—Farran, C. J., referred to the decision in *Damodar Gopal* v. *Chintaman Balkrishna*[3], and observed that the case suggested in that judgment was actually reproduced in *Sriram Samanta* v. *Kalidas Dey*[4], where it was held that a suit for profits brought by plaintiff dispossessed by the defendant was not cognizable by a Court of Small Causes, as it was in substance a suit for mesne profits.

It will be thus seen that, though a majority of the Judges in the Full Bench case noted above disapproved the decision in *Sriram Samanta* v. *Kalidas Dey*[4], the current of decisions in this Court has been in accordance with the view held by the minority of the Judges. Both Sir Charles Sargent and Sir C. Farran appear to have laid down that under clause 31 of Act IX of 1887, a claim of the plaintiff for mesne profits, based on the allegation that he had been dispossessed by the defendant, cannot be regarded as a claim in which the defendant rightfully received and wrongfully retained those profits. The claim must be treated as one to which clause 31 applied. The present case cannot, therefore, be regarded as one cognizable in a Small Cause Court and it falls within the excepted clauses.

(1) (1892) 17 Bom., 42.
(2) P. J. for 1896, p. 570.
(3) (1892) 17 Bom., 42.
(4) (1891) 18 Cal., 316.

1900.

ANTONE v. MAHADEV ANANT.

On the merits, I am satisfied that the appellant has a better case. Admittedly the party in possession was defendant No. 1, the purchaser. If for want of notice, or by reason of prior possession, defendant No. 1 was not held liable to plaintiff's claim, there seems to be no valid reason for holding defendant No. 3 liable, as he was admittedly not in possession. In the suit brought by Chandru this defendant was expressly exempted from all liability. I would, therefore, reverse the decree of the District Court, and dismiss the claim as against the appellant with costs.

CROWE, J.:—I concur.

*Decree reversed and claim dismissed as against appellant.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Ranade and Mr. Justice Fulton.*

1900.
*July* 19.

QUEEN-EMPRESS *v.* ANANT PURANIK.*

*Criminal Procedure Code (Act V of 1898), Secs. 196 and 235—Sanction to prosecute—Joinder of charges—Trial for more than one offence—Offences falling under two definitions.*

The accused was committed for trial before a Sessions Court on a charge of abetment of dacoity under section 116 of the Indian Penal Code (Act XLV of 1860). In the course of the trial the Assistant Sessions Judge added an alternative charge under section 511 of the Code and sentenced the accused under sections 395, 116 and 511 of the Indian Penal Code (Act XLV of 1860).

In appeal the Sessions Judge held that the evidence disclosed the offence an attempt to commit the offence of collecting arms, &c., with intention of ging war against the Queen, under section 122, and as no charge under that section could be framed for want of the sanction of Government under section 196 of the Criminal Procedure Code (Act V of 1898), the accused could not be brought to trial at all. He, therefore, reversed the conviction and acquitted the accused.

*Held*, (reversing the order of acquittal), that the mere fact that no charge for the graver offence under section 122 of the Indian Penal Code (Act XLV of 1860) could be framed for want of Government sanction, did not render the trial for the minor offence of attempting or abetting dacoity either irregular or illegal.

PER FULTON, J.:—According to the 2nd clause of section 235 of the Criminal Procedure Code (Act V of 1898), if the accused abetted an offence under sec-

* Criminal Appeal, No. 128 of 1900.

tion 122 of the Penal Code, and by the same speech also attempted or abetted the offence of dacoity, he could be tried for each of these offences; but as that section is controlled, as regards the offence against the State, by the provisions of section 196 of the Criminal Procedure Code, its operation in this case is restricted to the minor offence for which the accused could legally be charged and tried.

*Queen-Empress* v. *Karigowda*(1) and *In re Nagarji*(2) distinguished.

APPEAL by the Local Government under section 417 of the Code of Criminal Procedure (Act V of 1898) from an order of acquittal passed by R. Knight, Sessions Judge of Sátára.

The accused was originally charged under section 116 of the Indian Penal Code (Act XLV of 1860) with abetment of dacoity under the following circumstances as stated by the Sessions Judge:—

"In June, 1900, a Máng named Dasrya was arrested by the police for complicity in certain dacoities. From him the authorities learnt that a certain Bráhmin had been moving about among the Mángs in this district endeavouring to collect men to "march to Pratapgad, loot the Mahábaleshvar treasury, slaughter the Sáheb *log*, loot other treasuries, go to Poona, loot the jail and release Tilak.

"Dasrya named another Máng, Fakira, as cognizant of the plot. He was questioned, and corroborated Dasrya, and in his possession were found a number of *dhotis* and other garments much superior to the common apparel of his class. These, he said, the Bráhmin had given him.

"At this time the accused, who happened to be in Sátára, saw Fakira in police custody. Thereon he went to the Sheristedár of the District Superintendent of Police, an acquaintance of his, and asked him to recover from Fakira the money due for certain clothes which he, accused, had purchased for him from Kasturchand, a trader of this city. The Sheristedár mentioned this to the Chief Constable, and the identity of the accused with the Bráhmin conspirator was immediately established.

"Inquiries were made of Kasturchand, from whose books it was ascertained that the accused had purchased of him garments

(1) (1894) 19 Bom., 51. (2) (1894) 19 Bom., 340.

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similar to those found with Fakira, and the accused was then taken by the police and placed before the District Magistrate and the District Superintendent, in whose presence he made a certain statement. Further investigation was made and some small corroboration of the Máng's story was obtained, and accused was eventually committed for trial on a charge of abetment of dacoity."

In the course of the trial the Assistant Sessions Judge of Sátára added an alternative charge under section 511 of the Indian Penal Code, and convicted the accused of either instigating or attempting to commit dacoity under sections 395, 116 and 511 of the Code and sentenced him to eighteen months' rigorous imprisonment.

On appeal the Sessions Judge held that the evidence disclosed the offence of an attempt to collect men with the intention of waging war against the Queen; that the accused ought, therefore, to have been charged under section 122 of the Indian Penal Code; and that as the charge could not be framed under section 122 for want of the sanction of Government under section 196 of the Criminal Procedure Code (Act V of 1898), he ought not to have been prosecuted at all. The Sessions Judge, therefore, quashed the conviction and sentence, and acquitted the accused.

Against this order of acquittal, the Local Government appealed to the High Court.

Ráo Bahádur *Vasudev J. Kirtikar* (Government Pleader), for the Crown.

*B. A. Bhagvat*, for the accused.

RANADE, J.:—This is an appeal by Government under section 417 against the decision of the Sessions Judge of Sátára, who reversed the conviction and sentence passed on the accused by the Sessions Judge under sections 395, 116 or 511 of the Indian Penal Code. The accused had been originally committed for trial on a charge under section 116 of having instigated certain persons, Mángs and Rámoshis principally, to commit dacoity under section 395. In the course of the trial the Assistant Sessions Judge added an alternative charge under section 511, and convicted the accused of either instigation or attempting

to commit dacoity under sections 395, 116 or 511, Indian Penal Code. In appeal the Sessions Judge acquitted the accused after reversing the conviction on the charges named above, as he was of opinion that the real charge which should have been brought against the accused was an attempt to commit an offence under section 122; and if for want of the sanction of Government required by section 196, Criminal Procedure Code, 1898, this charge could not be framed, the accused should not have been brought to trial at all, or, at the most, should have been bound over to keep the peace under Chapter VIII of the Code. The Government Pleader has appealed against this order of acquittal, and contended that the Sessions Judge was in error in holding that the offence proved was under section 122 only. He contended that though the accused might have been charged under section 122 if the sanction of Government had been obtained, it did not follow that he could not be charged for the offence under sections 395, 116 or 511, for which there was direct evidence. The immediate and direct purpose for which the accused attempted to collect and enlist Mángs and Rámoshis was that of plundering the treasury, and though the ultimate object might have been of a political character this did not change the real nature of the offence actually committed, which must be determined not by the remote and possible consequences, but by what was presumably the immediate, natural and probable consequence of the criminal intention entertained by the accused. This immediate intention was one which fell within sections 391, 116 or 511, and that, therefore, the Sessions Judge was in error in reversing the conviction and sentence passed by the Assistant Sessions Judge.

The only point for consideration in this appeal is whether there was any error in the procedure followed by the Committing Magistrate and the Assistant Sessions Judge when the one committed the accused and the other inquired into the minor charge under sections 395, 116 or 511 because, owing to the want of sanction under section 196, Criminal Procedure Code, a charge under section 122 could not be made or inquired into. It appears from the evidence of the District Magistrate that the idea of a prosecution under section 122, Indian Penal Code, was given up by him after correspondence with Government, as he

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found from the police inquiry that there was no evidence to substantiate the charge under section 122. The District Magistrate as representing the Government had certainly full discretion in the matter of selecting the particular charges under which Government chose to prosecute the accused, and if he elected for want of evidence to give up the charge under section 122 it did not necessarily follow that no prosecution should be instituted on the minor charges, which the evidence might prove, and for which no special sanction was necessary. This was the view adopted by the Assistant Sessions Judge, before whom the accused's pleader had contended that it was not open to the Committing Magistrate to split up the graver offence and charge accused for the minor offence, because the graver charge could not be inquired into for want of the sanction of Government. This contention assumes that the evidence was sufficient to prove that the accused not only tried to instigate dacoity by collecting men, but that he intended that the men were to be collected to overthrow the British rule and establish his own rule like Shivaji, and slaughter all the Europeans, &c. This assumption, however, could not be made under the circumstances stated by the District Magistrate, according to whom there was no evidence to bear out the charge under section 122. If the Government was not so satisfied, it was not for the Committing Magistrate to decline to frame any charge or for the Assistant Sessions Judge to refuse to inquire into the charges on which the commitment was made. The whole question, therefore, has not been properly approached by the Sessions Judge when he set aside the Assistant Session Judge's conviction; because, in his opinion, the evidence warranted a charge under section 122, and he held that if such a charge could not be brought for want of sanction, no trial should have taken place on the minor charges, for which no sanction was necessary, and which the evidence was sufficient to prove. The Sessions Judge virtually has taken on himself the function of setting his own judgment against the opinion of Government, in a matter which by law belongs properly to Government, which alone under section 196 has the right to grant or refuse the sanction. If in the exercise of that discretion it refused for want of evidence to make the order, it was not for

the Sessions Judge to hold that it should have made the order or drop the prosecution altogether. Section 196 is not the only section which requires sanction. The preceding section 195 also provides that certain offences shall not be taken cognizance of by any Court, unless previous sanction for such prosecution is granted by the Court before which those offences were committed. The Court before which the offences are committed, have a discretion in the matter of giving or refusing sanction, and if the Court refuses such sanction, it does not follow that no complaints should be inquired into of the minor offences involved in the particular offences for which sanction is needed. For instance, personation is an offence under sections 170 and 171, in respect of which no sanction is necessary. It is also involved in section 205, which relates to false personation for the purpose of a suit. An offence under section 205 requires sanction before it can be inquired into by any Court. Supposing sanction is not granted under section 205 by the Court before which false personation for purposes of a suit was committed, it surely does not take away the authority of the Courts to proceed under sections 170 or 171 if the evidence warranted such a conviction. This same remark would apply to sections 206 to 210, which relate to fraudulent claims made or prosecuted in Civil Courts. If, for want of sanction, these offences could not be inquired into, it does not follow that the fraud should remain unpunished, if it could be proved under other sections of the Code, such as cheating, cheating by personation, &c. (sections 417 to 423) for which offences no sanction is necessary. The same remark applies to prosecutions under section 211 which relate to false charges of offences. If these could not be inquired into for want of sanction, it does not follow that the offender cannot be punished for giving false information (section 188) or defamation (section 500) if these minor charges could be proved. This was the principle of the decision passed by this Court in *Queen-Empress* v. *Karigowda*[1]. The decision in *In re Nagarji*[2] was referred to in the argument, and some expressions used by the Judges who decided this last case no doubt favoured the contention that it is an invasion of

(1) (1894) 19 Bom., 51.

(2) (1894) 19 Bom., 340.

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the law to treat an aggravated as an ordinary offence and thus introduce a different jurisdiction and a lower scale of punishment. But the point decided in that case had relation only to the privilege of pleaders. The analogy of witnesses was applied to them, and it was ruled that as witnesses cannot be prosecuted for defamation though they might be tried for perjury if they give false evidence, the pleader could not be punished for defamation if he exceeds his privilege. The cases decided in *Empress* v. *Abdool Karim*[1] and *Ramánund* v. *Koylash*[2] have no bearing on the present case. They only rule that a Magistrate cannot assume jurisdiction by splitting up a charge so as to disregard that portion of the charge which is beyond his jurisdiction. There was no such splitting up of charges in this case. The Magistrate would only obtain jurisdiction to try under section 122 when the Government granted the sanction under section 196. In the absence of such sanction the minor charge was probably inquired into. It appears to me that the Sessions Judge has laid too much stress upon the so-called confession made by the accused, which confession was held inadmissible in evidence by the Assistant Sessions Judge. Granting that the confession was admissible and did disclose an intention of an offence under section 122, it was surely open to Government to see if that intention was of a character which it could take into account. The Judge himself admits that the accused Puranik was crazy, and his intention to wage war with the help of Mángs and Rámoshis was ridiculous. He characterizes the design as insane and yet he seems to think that the intention of a crazy man must determine the charge that should be made; and if that particular charge could not be made, because of the insanity and insanity of the design of a crazy person, there should be no prosecution. The Sessions Judge's reference by way of authority made to pages 463 to 467 of Mayne's work seems obviously to be without any bearing. Mr. Mayne's remark relates to the distinction between riots which are mere disturbances of the peace and riots which may develop into the waging of war. In such cases intention must be the sole criterion. It

(1) (1878) 4 Cal., 18. (2) (1885) 11 Cal., 236.

is otherwise where, as in the present case, the craziness and insanity made it impossible to assign any other design than that of looting, which in such cases was not a mere incident but the principal object of the attempted offence.

The possible difficulty created by the committal being under sections 395 and 116 in a case in which no overt act was committed by anybody, was removed by the alternate charge under section 511 added by the Assistant Judge—*Queen-Empress* v. *Kalyan Singh*(1); *In re MacCrea*(2). To constitute such an attempt it was not necessary that any overt act should be committed by the persons invited to join, but seeing that the accused admittedly gave rich clothes to the Mángs to induce them to collect men, his act cannot be said to have been a mere preparation though it might not be an instigation when nobody was induced to join by reason of the solicitation—*Queen-Empress* v. *Dhundi*(3). Section 511 does not relate only to the penultimate act, but to all preceding acts if they were done with the intent to commit or facilitate the commission of the act. Taking this view I feel satisfied that the Assistant Sessions Judge was correct in the procedure followed by him, and that the Sessions Judge was in error in reversing that decision. It is not necessary to consider the question of fact, as both the Assistant Sessions Judge and the Sessions Judge agree in finding that the accused did instigate or abet the committing of dacoity. The sentence passed by the Assistant Sessions Judge must, therefore, be restored, and I order accordingly that the accused be sentenced to rigorous imprisonment for the unexpired portion of the original sentence passed upon him.

FULTON, J.:—Before dealing with the facts I will briefly refer to the questions of law on which the Sessions Court's decision turned. If it is true that the accused asked certain persons to collect men to overturn the Government and to loot the treasuries it seems to me that he abetted not only an offence under section 122, but also the abetment of dacoity (*vide* explanation 4 of section 108, Indian Penal Code). I cannot follow the reasoning on which the Sessions Judge held that as the accused was not

(1) (1894) 16 All., 409. (2) (1893) 15 All., 173.

(3) (1886) 8 All., 304.

prosecuted for the former offence he could not be convicted of the latter. We are bound by the provisions of the Code of Criminal Procedure, and the second clause of section 235 appears exactly to meet a case like the one under consideration. "If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the persons accused of them may be charged with and tried at one trial for each of such offences." That seems so explicit as to leave little room for argument. Here if the accused abetted an offence under section 122, and by the same speech also abetted the offence of abetment of dacoity, he could be tried for each of these offences according to the provisions of section 235, but as that section is controlled as regards the offence against the State by the provisions of section 196, its operation in this case is restricted to the minor offence for which the accused could legally be charged and tried. I do not think the decision in *Queen-Empress* v. *Karigowda*[1] has any bearing on the point in question. Some of the arguments in *In re Nagarji*[2] do support the view taken by the Sessions Judge, but with all deference to the learned Judges who decided that case I cannot but think that some of the dicta which were not really necessary for its determination go beyond the provisions of the Code.

The question whether a witness who makes defamatory statements in the witness-box can be convicted of defamation is one that has led to a great deal of difficulty, and various Courts have explained in different ways the grounds on which the practice of not convicting of defamation in such cases is believed to rest. In these circumstances I do not think we can safely apply to other classes of offences the arguments used in *In re Nagarji*[2]. The law on the subject of major and minor offences committed in the same transaction appears to me to be very correctly explained by Mr. Justice Candy in *Queen-Empress* v. *Gundya*[3]. Sections 346 and 347 prescribe the procedure to be followed by Magistrates in cases where the evidence indicates the commission of an offence which ought to be tried in a higher Court,

(1) (1894) 19 Bom., 51. (2) (1894) 19 Bom., 340.
(3) (1889) 13 Bom., 502.

but do not touch the matter now under consideration, in which there is no inherent insufficiency of jurisdiction in the Court, but merely a prohibition to its exercise without sanction. In these circumstances I agree with Mr. Justice Ranade in thinking that the refusal of Government to prosecute under section 122, Indian Penal Code, did not affect the accused's liability to punishment under other sections.

The next question to be determined is the section, if any, under which the alleged acts are punishable. The accused is said to have asked people to collect Mángs and Rámoshis for the purpose of making war on the Government and looting treasuries. Such an incitement I think is an instigation to instigate the commission of dacoity.

I am inclined to agree with the Judge in holding that an instigation to wage war against the Government includes an instigation to dacoity, as such war necessarily includes robbery; but there is no occasion to determine this point, as here it is said there was a distinct instigation to collect people to loot treasuries, which could only be effected by dacoity. There might or might not be a political object in view, but the offence of looting the treasury by means of a gang of more than five men and by overcoming the guards would certainly be dacoity. I cannot understand why the Sessions Judge says "a man does not in ordinary parlance, nor in any of the illustrations to section 108, instigate an offence which he is about to commit as a principal, nor is such an interpretation within the meaning of the term 'abetment.'" If A asks B and others to come with him to commit dacoity, he seems to me to instigate those men to dacoity, just as much as if he asks them to go under some other leader. Similarly if he asks B to ask C and others to join in dacoity he abets the abetment of dacoity. It would be a strange doctrine to hold that a person who did his best to bring about a dacoity by asking other people to join him, or employing an agent to collect them, could not be punished for abetment. The mere fact that no illustration of this kind is given under section 108, Indian Penal Code, does not alter the meaning of the word "instigate" in section 107. I agree with the Sessions Judge that section 511 is inapplicable in this case.

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The most the accused did was to make unsuccessful efforts to collect men and to buy some articles of clothing apparently for the reward or decoration of his followers. Apart from the difficulty alluded to by the Sessions Judge of attempting to commit an offence like dacoity which may itself consist merely in an attempt to commit robbery, I do not think the acts of the accused amounted to an attempt. In many cases it is hard to indicate the precise point at which a preparation to commit a crime becomes an attempt to commit it; and it is still more difficult to define in general terms the difference between a preparation and an attempt. In some cases the distinction is clear. If A merely buys a stick in order to beat B no one would think of saying that he attempted to beat B. If he ran at B with the stick, but was seized by C, probably most people would say that he did attempt to beat him. But there might be many intermediate cases in which there would be a difference of opinion whether the acts amounted to an attempt or merely constituted a preparation. It is unnecessary to enter into any discussion on this subject, as here I think it is clear that the acts alleged did not amount to an attempt, and that the introduction of section 511 into the case was superfluous.

The third question which I have to consider is one of fact to which Mr. Bhagvat almost exclusively confined his argument. He contended that the individual acts of abetment were not proved. But as the general intentions of the accused are proved conclusively both by his confession to Mr. Dodgson and by numerous witnesses, there seems no good reason for disbelieving the act of abetment to dacoity deposed to by Mahadu, whose statement is corroborated by the evidence of Dattatraya and to some extent by Ganesh. War against the Government would naturally be initiated by attacks on treasuries. There are other acts proved which might also perhaps constitute acts of abetment; but as this one act seems established, there is no need to discuss the rest. The accused ought to have been distinctly charged with the separate acts for which he was being tried instead of with one general charge of instigating various persons to commit dacoities; but he was defended by able pleaders who can have had no difficulty in finding out from the committal proceedings the offences alleged against him, and does not, therefore, appear to

have been prejudiced by the irregularity. I would now reverse the acquittal by the Sessions Judge, and would convict the accused under section 116, Indian Penal Code; and I would restore the sentence of eighteen months' rigorous imprisonment imposed by the Assistant Sessions Judge, and direct that the prisoner undergo the unexpired portion thereof.

## APPELLATE CIVIL.

*Before Mr. Justice Fulton and Mr. Justice Crowe.*

MURLIDHAR (ORIGINAL DEFENDANT-APPLICANT), APPELLANT, *v.* PARSHARAM (ORIGINAL PLAINTIFF-OPPONENT), RESPONDENT.*

1900. *June* 28.

*Mortgage—Redemption—Decree for redemption—Failure of mortgagor to pay the sum ordered by the decree—Rights of mortgagee on such failure—Transfer of Property Act (IV of 1882), Secs. 92 and 93.*

In a suit by a mortgagor for redemption of a mortgage dated 17th March, 1891, a decree was passed in 1897 allowing him to redeem on payment of the mortgage-debt within a year from the date of the decree; but the decree did not contain any provision for foreclosure or sale in default of payment on the due date.

The plaintiff having made default, the defendant applied to the Court for an order absolute for foreclosure or sale, under section 93 of the Transfer of Property Act (IV of 1882). His application was rejected on the ground that as the decree did not contain any clause for foreclosure or sale, section 93 of the Act was not applicable.

*Held*, in second appeal, that the defendant (mortgagee) was entitled to the remedy given by section 93 although the decree was not drawn up as prescribed by section 92. The omission of the Court to draw up the proper decree under section 92 did not deprive the mortgagee of the relief provided by section 93.

SECOND appeal from the decision of Ráo Bahádur D. N. Ranadive, Additional First Class Subordinate Judge, A. P., at Násik.

On the 30th January, 1897, the plaintiff obtained a decree for the redemption of a mortgage dated the 17th March, 1891.

The decree provided as follows:—

"The Court decrees plaintiff's claim for redemption of the mortgaged house and possession of title-deeds as prayed for, on

* Second Appeal, No. 661 of 1899.

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payment of Rs. 1,096-10-0 within one year from this date, and interest on the principal sum of Rs. 900 at 6 per cent. per annum from the 1st December, 1894, till payment to the defendant."

The plaintiff (mortgagor) was in possession of the mortgaged property.

In 1898 the defendant (mortgagee) presented a *darkhást* praying that as the mortgagor had failed to pay the mortgage-money within the time fixed by the decree, the mortgagor's right to redeem should be foreclosed and the applicant be put in possession, or that the mortgage-money be realized by sale of the mortgaged property.

The Subordinate Judge rejected this application. He held that the application was made under section 93 of the Transfer of Property Act (IV of 1882), but that section only applied when the decree had been made under section 92. The decree in this case was not in the form prescribed by section 92. It omitted to provide for the case of default in payment. Section 93, therefore, did not apply, and the applicant (mortgagee) was not entitled to any remedy not given by the terms of the decree. The decree was defective and the defect could not be cured in execution. In his judgment he said:—

"I am of opinion that the prayers of the applicant cannot be allowed in execution of the decree which contains nothing to that effect. It is a patent rule of law that a decree can only be executed according to its terms, and that no direction which it does not contain can be enforced. Sections 92 and 93 (of the Transfer of Property Act) must be read together. The former lays down the form of the decree and is the principal of the two, the latter being only explanatory. Where, therefore, the decree is not drawn up strictly under section 92, section 93 cannot help or come in to supplement it. When judgment was pronounced, it was the duty of the mortgagee or his pleader to have asked the Court to draw up the decree in the language of section 92, in which case section 93 would have applied. But as this was not done, the decree remained defective, which defect cannot be cured by section 93 in execution."

This decision was upheld in appeal.

The defendant preferred a second appeal to the High Court.

*D. A. Khare* for appellant.

*R. R. Desai* for respondent.

FULTON, J. :—We think the provisions of section 93 of the Transfer of Property Act are applicable to this suit notwithstanding that the mortgage was of a date before its introduction. Section 2 preserves the rights of the parties, but after the introduction of the Act the procedure for enforcing those rights is governed by its provisions. The case of *Nandram* v. *Babaji*(1) may be referred to as a precedent on this point. In these circumstances we think that the defendant can claim to enforce the provisions of section 93 although the first decree was not drawn up in the terms of section 92. It was a suit for redemption in which the plaintiff was allowed to redeem within a certain time, but nothing was said as to what was to happen if he did not pay the money within the time prescribed. Had he been out of possession, he would doubtless have lost his right to recover possession when the time expired. But as he was in possession, there was nothing in the wording of the decree to disturb him even though he failed to pay the redemption money.

The question then arises whether the mortgagee has no remedy in this suit. We think it is provided by section 93 and cannot agree with the lower Courts in holding that the omission of the Court to draw up a proper decree under section 92 deprives the mortgagee of the relief provided by section 93. What that relief may be—whether foreclosure or sale—depends on the nature of the mortgage.

We now reverse the orders of the Courts below and remand the application to the Court of first instance for disposal according to law. Costs throughout to be costs in the application.

*Order reversed.*

(1) (1897) 22 Bom., 771.

## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

1900.
*June* 29.

KRISHNAJI (AUCTION-PURCHASER), APPLICANT, *v.* MAHADEV VINAYAK (JUDGMENT-DEBTOR), OPPONENT.*

*Civil Procedure Code (Act XIV of* 1882), *Sec.* 310*A*, *as amended by Act V of* 1894—*Sale in execution of mortgage decree—Transfer of Property Act* (*IV of* 1882), *Sec.* 89.

The provisions of section 310A* of the Civil Procedure Code (Act XIV of 1882) as amended by Act V of 1894 are applicable to sales held in execution of mortgage decrees passed under the Transfer of Property Act (IV of 1882).

Sections 304 to 319 of the Code of Civil Procedure apply to all sales of immoveable property.

APPLICATION under section 622 of the Civil Procedure Code (Act XIV of 1882).

On the 2nd of November, 1897, a mortgagee obtained a decree for sale of certain mortgaged lands.

In execution of the decree the mortgaged property was put up for sale and was purchased by the applicant Krishnaji.

Thereupon the mortgagor applied to the Court to set aside the sale under section 310A of the Civil Procedure Code.

This application was opposed by the auction-purchaser on the ground that section 310A of the Code was not applicable to sales in execution of mortgage decrees passed under section 88 of the Transfer of Property Act (IV of 1882).

The Subordinate Judge of Panvel overruled this objection and set aside the sale.

Against this decision the auction-purchaser applied to the High Court under its Revisional Jurisdiction.

*B. N. Bajekar* for applicant.

*P. P. Khare* for opponent.

RANADE, J.:—There has been no decision of this Court on the point of law raised in this application, namely, whether section 310A applied to a sale in execution of a decree on a mortgage-bond, and which was governed by the Transfer of Property Act.

* Application, No. 194 of 1899, under extraordinary jurisdiction

This point, however, has been considered by the High Courts of Allahabad, Madras and Bengal.

The Allahabad High Court in *Raja Ram Singhji* v. *Chunni Lal*[1] remarked that, though, in the particular case before them, they had no occasion to discuss the question of the applicability of section 310A to sales in execution of mortgage decrees, yet the matter was of sufficient importance to justify them in expressing an opinion for the guidance of the Subordinate Judges. The opinion thus expressed was to the effect that section 310A will apply to a sale held in virtue of an order absolute for sale passed under section 89 of the Transfer of Property Act, although no power is given under that Act to postpone the operation of an order under section 89. The provisions of the Civil Procedure Code, section 291 of the old Act X of 1877, as also section 310A, were held to modify the concluding provisions of section 89 of the Transfer of Property Act.

The Madras High Court took the same view first in *Srinivasa Ayyangar* v. *Ayyathorai Pillai*[2], and more expressly in *Tirumal Rao* v. *Syed Dastaghiri Miyah*[3], in which last case it was observed that this application of section 310A was in accordance with the policy which suggested the amendment of the Code.

A Division Bench of the Calcutta High Court also in *Ashruf Ali Chowdhry* v. *Net Lal Sahu*[4] gave effect to the same view, but this decision was dissented from by a Full Bench of that Court in *Kedar Nath Raut* v. *Kali Churn Ram*[5]. The chief ground on which the Full Bench decision was made to rest, appears to have been that the Calcutta High Court had made rules under section 104 of the Transfer of Property Act, subject to which rules alone could the provisions of the Code of Civil Procedure be made to apply to sales under mortgage decrees. These rules have expressly made sections 304 to 319, Civil Procedure Code, to apply to sales of immoveable property. The rules were made in 1892, while section 310A was incorporated in the Code by Act V of 1894. The High Court held that as section 310A was not included in the rules as they stand, that section could

(1) (1897) 19 All., 205.
(2) (1897) 21 Mad., 416.
(3) (1898) 22 Mad., 286.
(4) (1896) 23 Calc., 682.
(5) (1898) 25 Calc., 703.

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not apply to sales under mortgage decrees governed by the Transfer of Property Act. It is clear that this reasoning does not apply to the other provinces the High Courts of which have made no rules under section 104. This is the case in the Bombay Presidency, and as the Calcutta ruling has, therefore, no application outside the jurisdiction of the Bengal High Court, the Madras and Allahabad rulings seem to be more appropriate. It is true that Maclean, Chief Justice, also referred to more general considerations, such as that section 310A would, if incorporated in the rules made under section 104, be inconsistent with the provisions of the Transfer of Property Act, and that it would lead to mischievous results. There can be no room for doubt, however, that if section 310A had been in existence before the Calcutta Rules were made in 1892, this section would have been included with the other sections 304 to 319 and sections 284 to 294. There is no more inconsistency of section 310A with the provisions of section 89 than there is of section 310 or 311, or better still section 291, which last gives great discretionary powers to the Courts to stop or adjourn sales. As regards the alleged mischief, it is to be noted that the Madras and Allahabad High Courts appear satisfied that section 310A is in keeping with the general policy which has suggested this and other methods of relief modifying the rigidity of execution sales. The evil sought to be remedied was, (in the words of Dr. Rash Behari Ghose, who introduced the Bill in the Supreme Council, which became law as Act V of 1894), that lands sold in execution seldom realized a fair price, and the sales were hurtful both to honest creditors and debtors, and benefited nobody but the speculative purchasers. The power of redeeming the land even after its formal sale, but before confirmation, was, therefore, conferred on the judgment-debtor. The section was drafted on the lines of section 174 of Bengal Act VIII of 1885 which was passed in the interests of another unfortunate class, the poor tenure holders whose lands were liable to be sold for arrears of rent. There is, therefore, nothing inconsistent or mischievous in the application of section 310A with a view to modify the rigours of the law of land sales in execution of mortgage decrees, any more than there is in the case of ordinary money decrees. In the absence of any

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rules, the provisions of sections 304 to 319 of the Code of Civil Procedure expressly apply to all sales of immoveable property. The mortgagors and persons claiming under them are the very persons who need most the relief intended to be conferred on judgment-debtors, and any other construction will defeat the main object of the legislation, which permits redemption even after sale in the case of those who are prepared to make full compensation to the creditor.

Agreeing, therefore, with the rulings of the Madras and Allahabad High Courts, we are of opinion that the Court of first instance was right in the view it took of the applicability of section 310A to sales in execution of mortgage decrees. We, therefore, discharge the rule with costs.

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## ORIGINAL CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Russell.*

1900.
*August* 22, 31

ESSA JACOB HAJI JAMAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE MUNICIPAL COMMISSIONER OF BOMBAY AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Municipality—City of Bombay Municipal Act (Bom. Act III of* 1888), *Sec.* 297—*Provision to make public street—Regular line of street.*

In 1888 the Municipal Commissioner of Bombay prescribed the regular line of a certain public street in Bombay, in accordance with the provisions of section 297 of the Municipal Act (Bom. Act III of 1888).

*Held*, that it was not open to the Municipal Commissioner in 1893 to prescribe a different line setting back the line prescribed by his predecessor.

THE plaintiff was the owner of a house in Chunam Kiln road near the Bhendy Bázár outside the Fort of Bombay. He sued for a declaration that the regular line of the said street was the line prescribed in 1888 by the then Municipal Commissioner, and that the present Municipal Commissioner had no power to alter this line, and he prayed for an injunction restraining the defendants from compelling him to set back his house beyond the said line.

The plaintiff complained that, in obedience to notices served on him on various occasions in 1899, he had been obliged to pull

* Suit No. 694 of 1899; Appeal No. 1100.

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down parts of his house. By a further notice, dated the 8th June, 1899, the Municipal Commissioner required the plaintiff to set back his house to "the regular line of the street" as marked upon a certain plan.

The following paragraphs of the plaint set forth the plaintiff's case :—

"4. The plaintiff says that the line referred to by the said Municipal Commissioner is not the regular line of the street, but that the regular line of the street is shown by the red line upon the said plan, and that the same was prescribed by the Municipal Commissioner, Mr. Ollivant, shortly after the passing of the Bombay Act III of 1888. The said line, shown in blue upon the said plan, was purported to be prescribed by the subsequent Municipal Commissioner on or about the 13th of December, 1893, and the plaintiff submits that, under the provisions of section 297 of the City of Bombay Municipal Act, a line can only once be prescribed as the regular line of the street, and that it is not competent for the Municipal Commissioner from time to time to alter the line once prescribed.

"5. The plaintiff says that if he is obliged to set back his building to the line prescribed in December, 1893, and indicated by the said blue line, a large portion of his property will be lost to him, and his house will be far less valuable than formerly."

The defendants' written statement was as follows :—

"1. The defendants say that the line shown in blue upon the plan annexed to the plaint if it corresponds with the line prescribed by the Municipal Commissioner in 1893 is the regular line of the street. The line shown in red on the said plan was a line prescribed previously by the Municipal Commissioner, but the Municipal Commissioner having determined that it would be for the public interest to have the said street widened to a width greater than at one time intended, prescribed and laid down the line shown in blue as the regular line of the street. The defendants say that such action was *intra vires* of the Municipal Commissioner, and that the allegations to the contrary made in the plaint are incorrect."

The lower Court held that the Commissioner had acted within his powers, and rejected the plaintiff's claim. The following judgment was given :—

CROWE, J. :—The question in this case is whether it is competent to the Municipal Commissioner to alter what is termed the regular line of the street after it has been once fixed. There is no dispute that in the street in question the line was prescribed after the passing of the Act in 1888, and that a new line for the

purposes of widening the street has been prescribed in 1893. The plaintiff's counsel relies on the wording of section 297 of the Act, which does not specify that the Commissioner may prescribe such line from time to time. But no power to widen a street is conferred by section 297. That power is given by section 289 of the Act, which vests the public streets in the Corporation, and provides that the Commissioner may from time to time widen, extend, or otherwise improve any such street. The putting back of the regular line of a street is obviously one method of widening the street, and it is apparently open to the Commissioner to take up the land required either under the provisions of section 296 or proceed under section 299. It seems clear that, in the absence of any restriction of his powers under section 297, he must be guided by the exigencies of traffic. As Mr. Inverarity put it in the case of transfer of the Cotton Green or any other crowded mart from one part of the city to another, it is obvious that certain streets might require widening, and to effect that, the regular line would require alteration. The object of that section, moreover, is not for the purpose of enabling the Commissioner to widen the street, but to ensure that the buildings shall be constructed in a regular line. I hold that it was competent to the Commissioner to lay down the new line and direct that the claim of the plaintiff be rejected with costs.

The plaintiff appealed.

*Lang* (Advocate General) and *Raikes* for the appellant (plaintiff).

*Starling* and *Jardine* for the respondents (defendants).

JENKINS, C. J.:—There is no dispute as to the facts in this case; for it is conceded that shortly after the passing of the City of Bombay Municipal Act (Bombay Act III of 1888) a line on each side of this public street was prescribed by the Commissioner in accordance with the provisions of section 297 of the Act. The only question is, whether it was open to the Commissioner to prescribe a different line in 1893, setting back the regular line of his predecessor. Mr. Justice Crowe has determined this in the affirmative, and from this decree the present appeal is preferred.

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The 297th section is part of Chapter XI of the Act, which is concerned with the "regulation of streets," and the several aspects of this topic are dealt with by separate and successive groups of sections. Thus sections 289 to 296 treat of the "construction, maintenance and improvement of public streets"; sections 297 to 301 with the "preservation of regular line in public streets"; and so on throughout the chapter.

Now in the first group we find the following powers vested in the Commissioner (His Lordship read section 289, clause (2), and continued:—) So that we find a check placed upon the exercise by the Commissioner of his powers of widening where the aggregate cost will exceed Rs. 5,000. We have no materials before us on which we can form an opinion as to what the adequate cost of the contemplated widening will be. Nor is this the only check which the section prescribes; for the joint effect of sections 296, 297 is that the Commissioner cannot acquire the land needed for the proposed widening except through Government, who have an absolute discretion in the matter.

It is not concealed in this case that the purpose of setting back the regular line of the street is to widen it: it is not for the purpose of preserving the "regular line of that street", for that *ex concessis* was already ensured by the line which in 1888 was prescribed by the Commissioner under section 297. Moreover, this evidently was the view presented to the first Court, for in his judgment Mr. Justice Crowe says: "There is no dispute that in the street in question the line was prescribed after the passing of the Act in 1888 and that a new line *for the purpose of widening the street* has been prescribed in 1893." But clearly the purpose of section 297 is not to enable the Commissioner to widen a public street—that power was expressly vested, as I have shown, in the Commissioner by the earlier group of sections, subject to the checks I have mentioned—it is to empower him to secure a regular line of street, an end already secured by the line prescribed in 1888. It has been argued by Mr. Starling that we should not interfere with the action of the Commissioner under section 297, merely because it may indirectly have a result for the attainment of which other provision is made; but this argument appears to me to overlook the admissions; for from them it

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logically follows that the conditions requiring and justifying the exercise of the power contained in section 297 have no existence and that the power is simply exercised in order to attain the indirect result.

It appears to me, therefore, that, on the true construction of the Act, the Commissioner's action in the light of the admitted facts is unauthorised. I come to this conclusion without having recourse to the suggested canon of construction, under which a power once exercised is exhausted, and the application of which in this country has been supported by reference to the terms of the General Clauses Act.

For these reasons I am of opinion that the decree of Mr. Justice Crowe must be reversed, and the injunction sought must be awarded. The Corporation must pay the plaintiff's costs throughout.

RUSSELL, J.:—The plaintiff, it appears, has a house in Chunam Kiln Road, near Bhendy Bázár, which bears the municipal street Nos. 15 to 19. During the year 1899 the plaintiff in consequence of various notices served on him by the defendants was obliged to pull down a part of his house adjoining Chunam Kiln Road and will be obliged to pull down more in order to rebuild his house. By a notice, dated 8th June, 1899, the first defendant (the Municipal Commissioner) required the plaintiff to set back the building to the regular line of the street, meaning thereby a line shown in blue upon the plan A to the plaint. The plaintiff, however, says that this blue line is not the regular line of the street, but the regular line of the street is the one shown in red on the said plan, which was prescribed by Mr. Ollivant, the then Municipal Commissioner, shortly after the passing of Bombay Act III of 1888. The blue line on the plan purported to be prescribed by the then Municipal Commissioner on or about the 13th of December, 1893. The effect of the alteration from the red to the blue line will be that the plaintiff will be compelled to set back his house to a considerably greater extent.

The plaintiff contends, and this is the only question before us, that under the provisions of section 297 of the City of Bombay Municipal Act (Bombay Act III of 1888) a line can only once be

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prescribed as the regular line of the street, and that it is not competent to the Municipal Commissioner from time to time to alter the line once prescribed.

Section 297 of the City of Bombay Municipal Act, 1888, provides as follows:—"(1) The Commissioner shall prescribe a line on each side of any public street within which, except under the provisions of section 310, no portion of any building abutting on the said street shall, after such line has been prescribed, be constructed."

"(2) A line so prescribed shall be called the regular line of the street."

Reading paragraphs (1) and (2) of the section together, it would run as follows:—"The Commissioner shall prescribe the regular line of the street on each side of any public street within which no portion of any building abutting on the said street shall, after such regular line of the street has been prescribed, be constructed." No option is left to the Commissioner to prescribe the line such as you find in section 296 as to his acquiring premises. The word "prescribe" implies, as it seems to me, a certain immutability. The word "regular" carries the same implication. In Johnson's dictionary to "prescribe" is "to set down authoritatively." "Regular" is "agreeable to rule; consistent with the mode prescribed." If the framer of this section really intended to empower the Commissioner from time to time to draw the regular line of a street, I cannot think that he would have framed it in such terms.

In the former Act (Bombay Act III of 1872, section 163) the words used are: "the line of the street or the line of the adjoining houses or buildings." This was evidently taken from section 68 of 10 and 11 Vict., cap. 34, "Towns Improvement Clauses Act, 1847", where the words are: "the line of the street or the line of the adjoining houses or buildings." In the Metropolis Management Amendment Act, 25 and 26 Vict., cap. 102, sec. 64, the words are: "It shall be lawful for the Metropolitan Board of Works to require the same (building) to be set back to such a line or in such a manner for the improvement of any street as the said Board shall direct." Sec-

tion 75 of that Act provides that no building, &c., shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, &c. Section 155 of the Public Health Act, 1875 (38 and 39 Vict., cap. 55), provides (*inter alia*) that when any house, &c., has been taken down in order to be rebuilt or altered, the urban authority may prescribe the line in which any house or building or front thereof is to be built or rebuilt. In section 162 of the Police and Improvement Act (Scotland), 1862 (24 and 25 Vict., cap. 101), it is provided: "The Commissioner may require the house or building to be set backwards on or towards the line of the street or the line of the adjoining houses or buildings." The words in the present section are stronger (and I must presume were intended to be so) than those in the sections I have above referred to.

The next question to consider is whether section 297 and the following sections down to section 301 inclusive should be construed as coming within the powers given to the Commissioner by section 289, clause 2, under the words "He may also from time to time widen, extend, or otherwise improve any such street, &c." I do not think they do. The scheme of the section 289 and the following would seem to be this: the Commissioner may from time to time widen or otherwise improve streets, &c. From time to time he may acquire lands having regard to sections 90, 91 and 92. For this purpose he shall have what an engineer would call a working line to go by: section 297 *et seq.* provide for it. The heading "preservation of regular line in public streets" of that section may be looked at in case of a difficulty of construction: see *Hammersmith, &c., Railway Company* v. *Brand*[1]; *Lang* v. *Kerr Anderson & Co.*[2]; and *Queen* v. *Local Government Board*[3]. I cannot think that the framer of these sections (297, &c.) intended that the line of streets in Bombay should depend on the idiosyncracies of the individual Commissioner.

It is obvious that it was intended that the powers to acquire land under section 296 are very different to the powers to set

(1) (1868-69) L. R., 4 H. L., 171 at p. 203. (2) (1878) 3 Ap. Ca., 529, at p. 533.
(3) (1882) 10 Q. B. D., 309 at p. 321.

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back under section 297 and the following sections; and it appears to me that the draughtsman intended to use apt words to bring out that difference. I have been unable to find any case which directly bears upon this point, but I would mention that in *Tear* v. *Freebody*[1] the regular line of buildings in the street in section 143 of 18 and 19 Vict., cap. 120, was held not to mean a strict mathematical line, but a substantially regular line; and in *Schulze* v. *Corporation of Gallashields*[2] the expression "regular line of the street" in section 162 of the Police and Improvement Scotland Act, 1862, above referred to was held to mean the line of the buildings forming the street, and not a line indicating that part of the street which is dedicated to the public as a highway. If the Commissioner has power from time to time to alter the regular line of the street, it appears to me that grave cases of hardship might arise. For instance, suppose a man buys a building abutting on a public street, which is within the regular line thereof and he buys it on the supposition that one regular line of the street has already been fixed; after the purchase circumstances may arise under section 298 which empowers the Commissioner to set back the building. If the defendant's argument is correct, the Commissioner might, by a stroke of the pen on the map, deprive the purchaser of part or even the whole of the building he bought. Again, a man might purchase a building in rear of the regular line of the street intending to rebuild it on the supposition that that regular line was fixed. Could the Commissioner alter that regular line so as to compel the purchaser to set forward his building as far as the Commissioner, by his new line, might determine? Other practical objections to the construction sought to be placed on section 297 by the defendants may, no doubt, suggest themselves.

I am of opinion this appeal must be allowed with costs.

*Appeal allowed.*

Attorneys for plaintiff:—Messrs. *Little & Co.*

Attorneys for defendants:—Messrs. *Crawford, Brown & Co.*

(1) (1858) 4 C. B. (N. S.), 228. (2) (1895) Ap. Ca., 666.

# APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Ranade.*

KACHU (ORIGINAL PLAINTIFF), APPELLANT, *v.* LAKSHMANSING GULABSING PARDESHI (ORIGINAL DEFENDANT), RESPONDENT.*

1900. *July* 24.

*Res judicata—Civil Procedure Code (Act XIV of* 1882), *Sec.* 13, *Explanations II and III—Redemption suit—Decree in such suit making no order as to mesne profits—Subsequent suit by plaintiff for surplus mesne profits accrued due prior to former suit.*

In a redemption suit brought in 1894 the plaintiff prayed for possession of the mortgaged property and for payment of such sum as should be found due to him on account of surplus profits received by the defendant. The Court held that the whole mortgage-debt had been paid off in 1883, and awarded possession to the plaintiff, but made no order as to surplus profits. The defendant appealed. The plaintiff did not appeal, nor did he file objections to the decree, which was confirmed by the Appellate Court. In 1897 the plaintiff having obtained possession of the land filed this suit in which (*inter alia*) he claimed to recover mesne profits which had accrued due prior to the former suit.

*Held*, that the claim was *res judicata* and was barred.

SECOND appeal from the decision of J. J. Heaton, District Judge of Násik, amending the decree of Ráo Sáheb G. R. Gokhale, Subordinate Judge of Pimpalgaon.

Suit for mesne profits.

The land in question had been mortgaged with possession to the defendant in 1870. Under the mortgage-deed he was to hold it for eight years and then return it to the mortgagor, provided he had received profits at the rate of Rs. 60 a year. Any sum by which the annual profits should fall short of Rs. 50 was to bear interest at the rate of 24 per cent.

On the 16th April, 1894, the plaintiff bought the equity of redemption from the heir of the mortgagor, and on the 8th June, 1894, he sued the defendant (Suit No. 431 of 1894) for possession of the land, for an account, and for payment of such sum as should be found due to him as excess profits received by the defendant.

The defendant alleged that, on accounts being taken, Rs. 825 would be found due to him.

* Second Appeal, No. 223 of 1900.

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The first Court found that the whole mortgage-debt had been paid off by the end of 1883 and that the defendant had been overpaid. It decreed possession, but passed no order as to the excess profits received by the defendant.

The defendant appealed, and the decree was confirmed.

In execution the plaintiff was put into possession on 17th March, 1897.

He then filed this suit claiming the excess profits received by the defendant for sixteen years prior to the date of the former suit and for two years subsequent to it.

The defendant pleaded that as the plaintiff had claimed mesne profits in the former suit, and they had not been awarded by the decree, the matter was *res-judicata*.

The Subordinate Judge allowed the plaintiff's claim, holding that it was not barred by sections 13 and 43 of the Civil Procedure Code (Act XIV of 1882).

On appeal the Judge held that as to the plaintiff's claim for the years prior to the institution of the former suit (8th June, 1894) the matter was *res judicata*, but he allowed the claim for the subsequent years and up to March, 1897, and varied the decree accordingly.

The plaintiff appealed to the High Court.

*Ratanji R. Desai*, for the appellant (plaintiff) :—The main relief which we sought in the former suit was redemption. There was no doubt a prayer in the plaint in that suit that surplus profits, if any, received by the defendant should be awarded to us, but no issue was framed on that point and there was no inquiry into it. The bar of *res judicata*, therefore, cannot arise with respect to our claim for mesne profits which accrued prior to that suit. We may claim them now in a suit specially brought for that relief. In the former suit the amount of mesne profits was not definitely ascertained, and the decree merely contained a declaration in our favour that the defendant had received mesne profits in excess of the debt due to him. We are, therefore, entitled to bring the present suit—*Becharji* v. *Pujaji*[1]; *Samatsang* v.

(1) (1889) 14 Bom., 31.

*Bawaji*[1]. Article 105, Schedule II of the Limitation Act, 1877, contemplates a suit like the present. As we were not then in possession, we were not in a position, when we filed the former suit, to know whether anything was due. It was when the Court made a declaration that the mortgage-debt had been paid off long before we filed that suit, that we ascertained that a large sum was due to us. There was no issue with respect to mesne profits in that suit. We claim a different relief now : therefore, section 13, Explanation III, of the Civil Procedure Code does not apply—*Bakshiram* v. *Darku*[2]. Our cause of action arose after we got possession in 1897.

*Daji A. Khare,* for the respondent (defendant) :—The plaint in the former suit contained a prayer for mesne profits, but the decree made no order with respect to them. Therefore, the prayer in the plaint must be deemed to have been refused. Explanation II of section 13 of the Civil Procedure Code bars the present suit—*Fatmabai* v. *Aishabai*[3] ; *Mahabir Pershad* v. *Macnaghten*[4]. The relief which is sought in the present suit was part of the cause of action in the previous suit. It cannot be said that the plaintiff's cause of action for the present suit arose after he got possession in execution of the former decree—*Baloji* v. *Tamangouda*[5]. The ruling in *Bakshiram* v. *Darku*[6] is not applicable because that decision was passed before Explanation III, section 13, of the Civil Procedure Code, 1882, was enacted. The mesne profits which accrued after the passing of the decree in the former suit can be awarded, but the claim for those that accrued before that decree is barred.

JENKINS, C. J. :—This suit is brought to recover Rs. 1,100 on account of eighteen years' mesne profits of a parcel of land alleged to have been received by the defendant.

On the 11th of November, 1870, the land was mortgaged with possession to the defendant by a predecessor-in-title of the plaintiff ; and in 1894 the plaintiff instituted a suit, No. 431 of that year, for redemption and recovery of the land. In that suit the plaint-

(1) P. J. for 1882, p. 404.
(2) (1873) 10 Bom. H. C. R., A. C. J., 369.
(3) (1888) 13 Bom., 242.
(4) (1889) L. R., 16 I. A., 107 ; 16 Cal., 682.
(5) (1869) 6 Bom. H. C. R., A. C. J., 97.
(6) (1873) 10 Bom. H. C. R., A. C. J., 369.

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iff alleged that the mortgage-debt had been fully satisfied and prayed, not only for possession of the land, but also for payment of such sum as should be found due from the defendant on account of excess profits received by him. The Subordinate Judge, by whom Suit No. 431 was heard, held that the whole mortgage-debt was paid off in 1883, and awarded possession: he, however, passed no decree as to surplus profits, though obviously on his finding there must have been such.

The defendant appealed to the District Judge, but the plaintiff did not by cross appeal or otherwise seek to have the omission as to excess profits rectified. The decree was on appeal affirmed.

These excess profits form part of the sum the plaintiff seeks to recover in this suit. In the first Court they were awarded to him, but this part of the decree was reversed on appeal by the District Judge of Násik, who has fully discussed the whole question in the course of his very careful judgment. From his decision the present appeal is preferred.

Now it is perfectly clear, not only that the plaintiff expressly prayed for payment of the excess profits, but also that he could have obtained that relief in Suit No. 431 of 1890. It was a relief that naturally flowed from the taking of the accounts, and the state of those accounts was a matter directly and substantially in issue in that suit. Section 13 of the Civil Procedure Code provides

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

"Explanation III.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused."

Explanation III must be read together with the rest of the section, and when so treated it no doubt calls for the qualification that the relief to which it relates is one that could be granted in the suit. That condition, however, I have shown is satisfied in the present case; for the surplus profits could have been recov-

ered in Suit No. 431 of 1890. This being so, it appears to me that the facts, with which we have to deal, fall precisely within the exact words of the section; so that the relief must be taken to have been refused and the question to have been heard and finally decided. As the case, in my opinion, falls within the terms of Explanation III, it is unnecessary to consider whether Explanation II is not also applicable.

Having, then, come to the conclusion that, apart from the cases, the words of section 13 are sufficiently comprehensive to embrace the facts of this case, it only remains to be seen whether there is any decision which calls on us to withhold the application of the section. It has, no doubt, been laid down that the plea of *res judicata* has no place where the omissions of the earlier suit are directly attributable to the intentional intervention of the Court. That doctrine, however, whatever its merit, is beside the question here, as there is no assertion of any such conduct on the part of the Court in Suit No. 431. Apart from this I can find nothing in the cited authorities to aid the present appellant, unless it be the case of *Bakshiram* v. *Darku* [1]. Now as to this decision it has, in the first place, to be noticed, that the distinction between it and that pronounced in the earlier case of *Baloji* v. *Tamangouda* [2] is not strikingly apparent. Still it must have appeared to the learned Judges to be distinguishable; for *Baloji's* case was pointedly brought to their notice in the course of the argument, and I cannot suppose they intended to overrule, without comment, the earlier decision of Sir Richard Couch and Newton, J. But, apart altogether from this, *Bakshiram's* case in no way assists us; for when it was decided, the provision of Explanation III had not been enacted. *Baloji's* case, however, is practically undistinguishable from the present: certainly it presents no distinction favourable to the appellant. It is identical in its circumstances with the present case save that the plaint there did not seek to recover the overpayments; that is to say, that case would not have fallen, as this does, within the precise terms of Explanation III. Yet it was held that the second suit would not lie.

(1) (1873) 10 Bom. H. C. R. (A. C. J.), 369.
(2) (1869) 6 Bom. H. C. R. (A. C. J.), 97.

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Reference was made to the recent decision of the Allahabad High Court in *Ram Dayal* v. *Madan Mohan Lal* [1], but that is clearly irrelevant to the point, as it simply dealt with a suit for profits that had accrued since the decree in the first suit.

The appellant's pleader relied on no other case before us, while the cases of *Ramabhadra* v. *Jagannatha* [2] and *Mahabir Pershad Singh* v. *Macnaghten* [3], to which attention was drawn in the course of the argument, certainly support the view that the plea of *res judicata* affords an answer in this case.

In my opinion, therefore, there is nothing in the decided cases to interfere with the plain words of section 13 of the Civil Procedure Code, so far as it is applicable to this case, so that, for the reasons I have already stated, I think the plea is a good answer to the suit. The appeal, therefore, must be dismissed, and the decree of the District Judge affirmed with costs.

RANADE, J.:—In this case the appellant-plaintiff, as purchaser from the mortgagor's son, sued the respondent-mortgagee for redemption in 1894. The mortgage was effected in 1870, and the bond provided that the debt should be liquidated in eight years by annual payments of Rs. 60 out of the profits of the land. The plaintiff in that suit claimed for an account and for possession of the land together with such excess profits as defendant might be shown to have received. Accounts were accordingly taken, and it was found that the debt had been paid off in eight years. No order about excess profits was made, but the mortgage-debt was declared to be satisfied and possession of the land was ordered to be restored to the plaintiff. The decree was confirmed in appeal. After plaintiff obtained possession under this decree, he secured an assignment of the claim for mesne profits (for sixteen years previous to the old suit and two subsequent years, up to the date of possession) from the original mortgagor's son in 1897, and on the strength of his new title he brought his present suit for eighteen years' excess profits. The defence was that the suit was barred under sections 13 and 43, Civil Procedure Code.

(1) (1899) 21 All., 425. (2) (1890) 14 Mad., 328.
(3) (1889) L. R., 16 I. A., 107; 16 Cal., 682.

The Court of first instance held that the suit was maintainable, and awarded plaintiff's claim for thirteen years, from 1883 to 1896, at the rate of Rs. 43-7-0 per year. In appeal the District Judge held that the claim for the profits prior to the old suit was not maintainable and that only three years' profits subsequent to the date of the old suit might be allowed. He accordingly amended the decree of the Court below.

In second appeal the principal question argued before us relates to the point of law, whether, under the circumstances of this case, the claim for past profits was maintainable, or whether it was barred under section 13 or 43 of the Civil Procedure Code. The Court of first instance in its lengthy judgment notes the fact that the rulings of the different High Courts in India are conflicting on this point. They are, however, in accord in holding that where the Court which tried the first suit has advisedly refused to adjudicate on a portion of the claim made, or relief asked, or suggested to the plaintiff that he should bring a fresh suit, the right to bring the subsequent suit might be considered as expressly reserved. Where no such reservation or suggestion is made, the High Courts are not in agreement, and the only rule which can be drawn, especially from the Bombay authorities—*Thakore Becharji* v. *Thakore Pujaji*[1]; *Kakaji Ranoji* v. *Bapuji Madhavrav*[2]—is, according to the Subordinate Judge, that a second suit will not be barred where the inquiry and the judgment in the former suit impliedly suggest the remedy of a fresh suit. He holds that this implied suggestion was made in the present case, because while both the Courts decided in the former suit that the defendant was accountable, they did not determine the actual surplus due by him and, therefore, the present suit was maintainable. The District Court in appeal was of opinion that there was no such implied suggestion. The question of excess profits was inquired into and the whole of the evidence was given in respect of them, so much so that no further evidence was found necessary in the present case. It came to the conclusion that if the first Court did not determine the profits in the former suit, plaintiff's remedy was by way of appeal, and that the words of section 13, Explanation III, were quite clear, and justified the rejection of plaintiff's claim for past profits.

(1) (1889) 14 Bom., 31. (2) (1871) 8 Bom. H. C. R., 205.

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This summary of the reasons given by the Courts below will serve to bring out the real point in issue. I agree with the District Judge in thinking that, under the terms of section 13, the claim for past profits now made by plaintiff must be held to be barred. The section states that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue between the same parties, litigating in the same rights, and has been heard and finally decided by such Court.* The first explanation shows what is meant by the words directly and substantially in issue. They mean that the matter must be alleged by one party and either denied or admitted expressly or impliedly by the other. The question of excess profits was such a matter in the former suit. It was directly alleged in the plaint itself, where an express claim was made for surplus profit. It was denied by the other side. The general issue, what amount is due to the defendant on the mortgage, did not expressly raise the contention, but it impliedly raised that question. The matter was heard and decided by both the Courts, when they held that the mortgage debt had been paid off either in 1878 or 1883. The Appellate Court held that the defendant had received surplus profits for seventeen years after the expiry of the stipulated eight years, and that a large balance was due to the plaintiff. Under these circumstances, if the plaintiff had in the first Court or in appeal claimed the surplus, it would have been awarded to him. This matter of surplus was a relief claimed in the plaint, which was not expressly granted by the decree, and it must, for the purposes of this section, be deemed to have been refused, and if once refused, it is plain that it cannot be the subject of a separate suit. This view of the matter is confirmed by the fact that plaintiff deemed it necessary to go through the process of taking a fresh deed of assignment in 1897 for a consideration which was held to be nugatory by the Court of first instance for the reason that the assignor had no interest left in the surplus profits which was included in the previous deeds of sale passed in 1894. Quite independently of the authorities, therefore, it is clear that the appellant had no right to bring his present suit. His remedy was by way of review or appeal in the previous proceedings.

As regards the authorities, it may be useful to take the Bombay cases first. In the case of *Baloji* v. *Tamangouda*[1] a mortgagor filed a suit to redeem, and alleged that the mortgagee had been overpaid, but he did not sue to recover the overpayments. These were, therefore, not awarded to him, and when he brought a second suit, it was held that he could not claim such overpayments. This is, therefore, a distinct authority against the present appellant. The case of *Sitaram* v. *Bhagvant*[2] is not to the point, because it only relates to mesne profits after the date of the suit. If the omission to grant such profits was not deliberately made in the old decree, they could be claimed in a separate suit. The third case—*Bakshiram* v. *Darku*[3]—is no doubt not easily reconcileable with *Baloji* v. *Tamangouda*, quoted above. But it may be distinguished on the ground that in that case there was no adjudication about the improvements, while in the present case both Courts found that the debt had been paid off and a balance was due to the plaintiff. The ruling in *Haji Hasam Ibrahim* v. *Mancharam*[4] directs that plaintiff must bring forward all the grounds for the relief he seeks. If he fails to do so, he cannot bring separate suits to harass the defendants. The decision in *Shivalingaya* v. *Nagalingaya*[5] was to the same effect. The case of *Fatmabai* v. *Aishabai*[6] contains a ruling on Explanation III of section 13, and decides that where the declaration was not sought by way of specific relief, the omission to give it was not a refusal within the meaning of this explanation. In the case before us the award of extra profits was sought as a principal relief, and the silence of the decree must be regarded as a refusal. The decision in *Thakore Becharji* v. *Thakore Pujaji*[7], on which the Court of first instance had chiefly relied, was really based by the Judges on the fact that the refusal to grant the amendment asked for made the decision one in which there was no hearing and no determination which are essential to create the bar under section 13. In the present case there was a hearing and a determination that defendant owed a balance to the plaintiff. This ruling, therefore, is not applicable to the present case. In *Ram-*

(1) (1869) 6 Bom. H. C. R., 97.
(2) (1869) 6 Bom. H. C. R., 109.
(3) (1873) 10 Bom. H. C. R., 369.
(4) (1878) 3 Bom., 137.
(5) (1878) 4 Bom., 247.
(6) (1888) 13 Bom., 242.
(7) (1889) 14 Bom., 31.

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*krishna* v. *Vithal*[1], though no actual finding on the issue of *bona fides* was recorded, yet as the decision was passed in plaintiff's favour, it was held that the second suit questioning the *bona fides* could not be maintained. This supports the view taken by the District Judge in the present case. The decision in *Ghela Ichharam* v. *Sankalchand Jetha*[2] ruled that where the issue is not necessary, the decree in the former suit does not cover that issue, and a separate suit raising the question involved in such issue is not barred. In the present case the issue was not unnecessary, and the decree, therefore, covers the finding which awarded possession, but was silent about the profits. The general conclusion to be derived by a study of these Bombay decisions seems thus to lend support to the view taken by the District Judge, and the distinctions made in the judgment of the Court of first instance seem to be not well founded.

Turning next to the Calcutta cases, the decision in *Bijnath Pershad* v. *Badhoo Singh*[3] related to mesne profits after the suit. In regard to this claim there was a prayer in the plaint, but no order was made in the decree either way, and it was accordingly held that the second suit would lie in such a case. In the present case the mesne profits after the institution of the first suit have been allowed by the District Court. In *Mahomed Gazee* v. *Noor Mahomed*[4] it was ruled that plaintiff was bound to put forth every title on which he can succeed and to obtain decision thereon. If the Court neglects to decide any part of his claim, he cannot bring a separate suit in respect of it. This decision is clearly against the present appellant. In *Gungabishen Bhugut* v. *Roghoonath Ojha*[5] the second suit was held maintainable because the Court of appeal disposed of the case on the point of possession, and did not decide the question of title. In the present case there was no such omission on the part of the Appellate Court. The ruling in *Ram Charan* v. *Reazuddin*[6] relates to a case where the Court advisedly left undecided a particular issue, and reserved it for a fresh suit, which was, therefore, held maintainable. The question of surplus profits

(1) (1890) 15 Bom., 89.
(2) (1893) 18 Bom., 597.
(3) (1868) 10 Cal. W. R., 486.
(4) (1875) 24 Cal. W. R., 324.
(5) (1881) 7 Cal., 381.
(6) (1884) 10 Cal., 856.

was not so reserved in the present case. Evidence was given about it and the Courts declared their opinions. The decision in *Nundo Lall* v. *Bidhoo Mookhy Debee*[1] resembles the Bombay decision noted above—I. L. R., 18 Bombay, p. 597; *Ghela* v. *Sankalchand*. The ground of decision in *Jagatjit Singh* v. *Sarabjit Singh*[2] was expressly stated to be that the question about wha land belonged to Sipah was not in issue, and that nothing regarding it was heard or decided. In such cases section 13 has no operation. In the present case, however, the surplus profits were inquired into. The ruling, therefore, does not apply. The decision in *Nil Madhub Sarkar* v. *Brojo Nath Singha*[3] was based on the fact that the first and second suits were both rent suits for different years, and defendant's failure to prove his defence in the first case did not prevent him from raising the same defence in the second suit which was based on a different cause of action. The next case is of *Jiban Das* v. *Durga Pershad*[4] —and it resembles in all respects the facts of the present case. The first suit was for possession and three years' profits. The decree gave possession, but was silent about profits. The second suit was brought to recover past and future profits. The claim for past profits was not allowed on the ground that the old decree operated as *res judicata*, while the claim for future profits was allowed. The judgment in this case was very properly relied on by the District Court. It distinguishes the claim for past profits from future profits. The seemingly opposed decision in *Mon Mohun Sirkar* v. *The Secretary of State for India in Council*[5] was held to relate to future profits, in respect of which the Courts have a discretion to grant or refuse relief under the Civil Procedure Code.

The Allahabad High Court in *Ram Dayal* v. *Madan Mohan Lal*[6] took the same view as the Calcutta Judges who decided the last case and made a distinction between past profits and future profits in respect of which last claim the Courts have discretion in allowing or refusing them, and, therefore, where the first decree was silent, a second suit was maintainable. There was

(1) (1886) 13 Cal., 17.
(2) (1891) 19 Cal., 159.
(3) (1893) 21 Cal., 236.
(4) (1893) 21 Cal., 252.
(5) (1890) 17 Cal., 968.
(6) (1899) 21 All., 425.

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no such discretion in regard to past profits, and if the decree was silent, no second suit can be maintained for the same. The Allahabad High Court disapproved the decision in *Ramabhadra* v. *Jagannatha*[1], which cannot be reconciled with the rulings of the other High Courts on this point. This review of the authorities shows that, as far as the present case is concerned, there is a general agreement of the High Courts of Bombay, Calcutta and Allahabad on the point that when a claim for past profits is made in the former suit and inquired into, and the finding recorded that there was a balance due to plaintiff, but no particular sum was fixed by the decree, no second suit can be maintained by reason of the bar created by section 13, Explanation III, and the plaintiff's obvious remedy was to apply for review to the first Court or appeal to the District Court. As he failed to do this, his present claim was properly held by the District Judge to be not-maintainable. In this view I would confirm the decree of the District Court and dismiss the appeal with costs.

*Decree confirmed.*

(1) (1890) 14 Mad., 323.

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## APPELLATE CIVIL.

*Before Mr. Justice Fulton and Mr. Justice Batty.*

1900. *July* 25.

BHIMBHAT (ORIGINAL DEFENDANT), APPELLANT, *v.* YESHWANTRAO (ORIGINAL PLAINTIFF), RESPONDENT.*

*Undue influence—Sale—Inadequacy of consideration—Contract—Voidable contract—Contract Act (IX of 1872), Sec. 16.*

Inadequacy of consideration in conjunction with the circumstances of the indebtedness and ignorance of the vendor are facts from which a Court may infer the exercise of undue influence.

SECOND appeal from the decision of T. Walker, District Judge of Dhárwár.

Plaintiff sued to set aside a deed of sale passed by him to the defendant, on the ground that the deed was obtained from him by defendant by undue influence.

*Second Appeal, No. 636 of 1899.

Plaintiff was an illiterate agriculturist heavily indebted to defendant, who was a money-lender.

Plaintiff alleged that he owed to defendant Rs. 1,400 on three mortgage-bonds; that the defendant pressed him for payment; and that as he had no means to satisfy the debt, he passed a sale-deed on 12th July, 1896, of certain lands for Rs. 2,000; that this sum was made up of the mortgage-debt of Rs. 1,400 and two other debts of Rs. 300 each due to other creditors which defendant undertook to pay to those creditors. He further alleged that there was an oral agreement by which defendant had agreed to reconvey the property to him if he repaid Rs. 2,000 within three months from the date of the execution of the deed; that he had offered to do so within the stipulated time, but defendant refused to accept the offer.

Defendant contended that the transaction was an out-and-out sale, and that he had not used any undue influence to obtain the deed of sale.

The Court of first instance held that the consideration for the sale was inadequate; that the defendant had taken undue advantage of his debtor's position, and had obtained the sale-deed by undue influence. It, therefore, passed a decree directing that, if the plaintiff paid Rs. 1,400 to defendant within three months, the sale-deed should be cancelled.

In appeal, the District Judge upheld this decision.

Against this decision the defendant preferred a second appeal to the High Court.

*V. G. Bhandarkar*, for *V. K. Bhatavdekar*, for appellant.

*N. P. Patankar*, for respondent.

FULTON, J.:—The plaintiff, who was indebted to the defendant No. 1 to the amount of Rs. 1,400, alleges that he was pressed for payment, but having no money he executed a sale-deed of certain land for Rs. 2,000—made up of the above mentioned item of Rs. 1,400 and two other debts of Rs. 300 due to defendant No. 2 and one Rudrapa which defendant No. 1 undertook to repay. He further says that there was an oral agreement by which the first defendant agreed to return the deed of sale if plaintiff repaid

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Rs. 2,000 within three months from the date of execution of the deed.

The District Judge has not recorded any finding as to the oral agreement, but has held that the execution of the deed of sale was induced by undue influence. It was argued before us that there was no evidence to support this finding, but we are unable to accept this contention. The Judge has found that the plaintiff is an ignorant Kunbi heavily indebted to the first defendant who is a Bráhmin sávkár; that the consideration is very inadequate, the land being worth from Rs. 3,000 to 5,000; that the debts due to defendant No. 2 and Rudrapa were not paid off by the plaintiff; and that within a very short time the plaintiff offered full payment to the first defendant. On these facts the Judge found that the first defendant had used undue influence to compel the plaintiff to pass the deed of sale. The question whether the relations between the parties were such that one of them was in a position to dominate the will of the other, and used that position to obtain an unfair advantage over the other, was one of fact, with the finding on which we could only interfere if there were no evidence to support it. The law in regard to undue influence is very clearly explained in section 16 of the Contract Act as recently amended, but we do not think the law as now defined differs in substance from that laid down in 1866 by Westropp, J., in *Kedari* v. *Atmarambhat* (1). Inadequacy of consideration in conjunction with the circumstances of indebtedness and ignorance were facts from which it would have been as permissible before the amendment of the Contract Act to infer the use of undue influence as it would be since that amendment. In the present case we think the inference drawn by the Courts below was reasonable, for it is difficult to imagine why a Kunbi cultivator should have sold his land for a sum far below its value unless he were unduly influenced by the necessities of his position and the pressure of the creditor.

If there was an oral agreement for the return of the sale-deed on repayment of the money within three months, the grounds for believing that undue influence had been used would be all the stronger, for it would be difficult to suppose that any sensible

(1) (1866) 3 Bom. H. C. R. (A. C. J.), 11.

man, if free to act as he chose, would consent to record in writing the part of the agreement which if unqualified would deprive him for ever of his land, and to leave to the uncertainties of oral testimony the promise to return the sale-deed if the money were paid within three months. The proposition has only to be stated to raise a strong feeling that the man who is shown to have acted in this way cannot have been acting of his own free will.

It was urged that the plaintiff should be required at least to pay Rs. 1,700 to the first defendant and not merely Rs. 1,400, as the second defendant admitted that he had received his Rs. 300 from the first defendant through the plaintiff, but the Courts below have found that it is not proved that the first defendant supplied the money to pay defendant No. 2. The District Judge indeed doubts whether defendant No. 2 was paid at all, and points out that as no bond has been returned, the plaintiff is in no way protected. The second defendant has not been made a party to this appeal or to the appeal to the District Court, and will, therefore, not be bound by any decree which we may pass. Consequently as it is not proved that the plaintiff has been discharged of this debt to defendant No. 2, we cannot revise the decision of the Courts below on this point.

We vary the decrees of the Courts below by allowing the plaintiff three months from this date within which he may pay the sum of Rs. 1,400 to the first defendant, and in other respects we confirm those decrees with costs.

*Decree varied.*

## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Ranade.*

VINAYAK VITHAL BHANGE AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* GOVIND VENKATESH KULKARNI (ORIGINAL PLAINTIFF), RESPONDENT.*

1900. *July* 31.

*Hindu law—Widow—Alienation by widow of land inherited from her husband—Reversioner—Consent of reversioner to alienation—Subsequent claim by son of consenting reversioner to set aside alienation.*

One Govind Bhagwant died, leaving him surviving a widow Radhabai, a sister Bhimabai and her son Venkatesh. Radhabai alienated to the defendant

* Second Appeal, No. 201 of 1900.

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five plots of land inherited by her from her deceased husband. Two of them (Nos. 495 and 496) were sold with the consent of Venkatesh to defray the expenses of his marriage. The sale-proceeds were received by Venkatesh and the sale-deed was attested by him. The other three plots (Nos. 497, 498 and 499) were relinquished by Radhabai in favour of the defendant, as she was unable to pay Government assessment. The plaintiff was the son of Venkatesh and was born after these transactions. After the sale and relinquishment in favour of the defendants, Bhimabai died, then Venkatesh, and in 1889 Radhabai died. In 1897 the plaintiff brought the present suit as reversionary heir of Govind Bhagwant against the defendant to recover possession of the five plots of land alienated to him by Radhabai.

*Held*, that the sale of the two plots Nos. 495 and 496 by Radhabai to the defendant was good, and the plaintiff was not entitled to recover them. The consent given by Venkatesh, the plaintiff's father who was at the time the only male reversioner in existence, validated the sale.

As to the remaining three plots (Nos. 497, 498 and 499) the plaintiff was entitled to recover them. There was no consent given, or legal necessity for their alienation proved.

SECOND appeal from the decision of C. H. Jopp, District Judge of Ahmednagar, amending the decree of Ráo Sáheb S. N. Sathye, Subordinate Judge of Karjat.

Suit by reversioner for possession of certain land.

The land in question had belonged to one Govind Bhagwant, who died childless in 1857, leaving him surviving his widow Radhabai, a sister Bhimabai and a nephew (Bhimabai's son) Venkatesh.

Radhabai succeeded to her husband's property, and in 1862 she sold two plots (Nos. 495 and 496) of the land in question to the defendant in order to raise money for the marriage of the abovementioned Venkatesh, her deceased husband's nephew. Venkatesh gave his consent to the sale, but there was no evidence that Bhimabai, his mother, had consented. Venkatesh in fact received the sale-proceeds and attested the sale-deed. In 1864 Radhabai transferred the remaining three plots of land (Nos. 497, 498 and 499) to the defendant. No consent was given to this transaction.

Bhimabai died in 1869 and Venkatesh died in 1877, leaving the plaintiff his son and heir. Radhabai died in 1889.

In 1897 the plaintiff brought this suit for possession of the said land, alleging that he was the reversionary heir of Govind Bhagwant and had become entitled to the property on the death of Radhabai, Govind's widow. He sought to set aside the sale and transfer of the lands by Radhabai to the defendant on the ground that it was made by her without legal necessity and could only have effect during her life.

The defendants pleaded that the sale of the first two plots (Nos. 495 and 496) was made by Radhabai for legal necessity and with the consent and for the benefit of the plaintiff's father Venkatesh; that the sale was, therefore, effectual; and as to the remaining plots (Nos. 497, 498, 499) that Radhabai had transferred them to the defendants because she was unable to pay the assessment.

The Subordinate Judge awarded the plaintiff's claim.

On appeal the Judge found that legal necessity for the sale by Radhabai was not proved; that there was no evidence that Bhimabai had consented to the sale; and that the consent of Venkatesh did not validate the sale. He held that the plaintiff was entitled to recover the property, but that he must pay the defendants the money expended in improving plots Nos. 495 and 496. He accordingly amended the decree.

The defendants appealed to the High Court.

*Vinayak V. Ranade* for the appellants (defendants):—The sale by Radhabai was valid. There was a legal necessity for it. She required money for the marriage of the plaintiff's father Venkatesh, who was her nephew,—that is, her husband's sister's son. At that time Venkatesh was the only male reversionary heir in existence. Further, the sale was effected with his knowledge and consent. The plaintiff, who is the offspring of the marriage for which the money was required, cannot now impugn the sale. The very fact that the plaintiff's father, who was interested in the property, consented to the sale raises a presumption that the transaction was a fair one and justifiable under Hindu law—*Raj Lukhee Debia* v. *Gokool Chunder Chowdhry* [1].

*Mahadeo V. Bhat* for the respondent (plaintiff) :—The plaintiff does not claim the property through his father, but he claims it

[1] (1869) 13 M. I. A., 209, 228; 12 Cal. W. R., 47.

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in his own right as the reversionary heir of Govind after the death of his widow Radhabai. The consent given by the plaintiff's father for the sale of the two plots cannot make the sale valid because at that time plaintiff's mother Bhimabai was alive and she was the reversionary heir. If Radhabai had predeceased Bhimabai, the latter would have been entitled to the property, and she would have taken it absolutely, being the sister of the last male holder. In such case the consent of the plaintiff's father would have been of no avail to the defendants. Further, the performance of the marriage of plaintiff's father was not a legal necessity. Plaintiff's father was not a member of Radhabai's husband's family.

[JENKINS, C. J.:—Plaintiff owes his existence to that marriage, and can you now attack the sale on the ground that there was no legal necessity for it ?]

Next we contend that as Bhimabai was the reversionary heir at the time of the sale, her consent ought to have been taken. When there are several reversionary heirs, the consent of all such heirs is necessary to validate an alienation by a widow—*Varjivan* v. *Ghelji* [1]. It does not always happen that one reversionary heir gets the property through another prior reversionary heir, and it is this circumstance that makes the consent of all the reversioners necessary. The right of a reversioner comes into existence only after the death of the widow of the last male holder. His consent to an alienation may raise a presumption in favour of its propriety, but there must be also legal necessity for it. The Judge has found that there was no such necessity for the sale, and we contend that this is a finding of fact.

JENKINS, C. J.:—The point for decision in this appeal is the validity of an alienation by a widow as against the reversioner, who became entitled on her death. The material facts may be shortly stated.

Govind Bhagwant died many years ago, leaving a widow Radhabai, a sister Bhimabai, and nephew Venkatesh. Bhimabai's son Venkatesh afterwards became the father of the plaintiff. Radhabai succeeded to her husband's property, which comprised

[1] (1881) 5 Bom., 563.

the lands in suit, and in 1862 and 1864 she sold these lands to the defendants. To the sale of that portion which consists of Nos. 495 and 496 Venkatesh consented; to the sale of the three remaining numbers—497, 498 and 499—no consent was given.

I will first deal with Nos. 495 and 496. The defence as to them is, that they were sold for legal necessity, and with the consent and for the benefit of Venkatesh. The plea of legal necessity has been rejected by both Courts, but the consequence flowing from Venkatesh's consent under the peculiar circumstances of the case has not been adequately considered. The circumstances are, that when the sale was effected, Venkatesh, so far as appears, was the only male kinsman, and the sale was effected to raise the necessary funds for Venkatesh's marriage, which resulted in the birth of the present plaintiff. Though Venkatesh was the nearest and in fact the only male relative of Radhabai at the time of the alienation, still he was not the next reversionary heir; his mother Bhimabai was; and it is this which gives rise to the difficulty in this case, for the lower Appellate Court was unable to find that Bhimabai's consent was given.

Now there can be no question that apart from legal necessity a widow can validly alienate land that has devolved on her from her husband with the consent of the reversioner. The basis on which this rests is a matter of controversy: the High Court of Calcutta on the whole appears to favour the view that the consent derives its effect from the power supposed to reside in a widow of accelerating, by the surrender of her own interest, the interests of the reversioners. It is impossible not to feel some difficulty as to this doctrine: for it would seem to rest on the application to a Hindu widow's estate of the English doctrine of the merger of a particular estate, with a result that the devolution of a property according to law is influenced by the acts of those who are simply in the possible line of succession.

The other view is that the consent of the persons interested to oppose the transaction evidences its propriety, if not its actual necessity.

This has a parallel in the law relating to a widow's adoption under certain circumstances and it finds support in the texts.

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Thus Narada says: "When the husband is deceased, the deceased husband's kin are the guardians of his sonless wife; in the disposal and care of property, as well as in the matter of maintenance, they have full power. But if the husband's family be extinct, or contain no male, or be helpless, or there be no sapinda of his, then the kin of her own father are the guardians of the widow." I take this translation from Babu Golap Chandra Sarkar's valuable book on Hindu law at page 278. This text of Narada is cited in the Dayabhaga XI, 1, 64; and Jimutavahana adds: "In the disposal of property by gift or otherwise she is subject to the control of her husband's family after his decease and in default of sons."

This view has, too, in a measure the sanction of the Privy Council, seeing that it was put forward as an explanation of the greater power vested in a widow by virtue of the reversioner's consent. In *The Collector of Masulipatam* v. *Cavaly Vencata* (1) it was said: "The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made is proper." Again, in *Raj Lukhee Debia* v. *Gokool Chunder Chowdhry* (2) it was said: "Their Lordships do not mean to impugn the authorities, &c., which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such cases must be generally understood to be all those who are likely to be interested in disputing the transaction."

Turning, then, to Bombay, the High Court here appears to have accepted this view rather than that which finds favour in Calcutta. The case of *Varjivan* v. *Ghelji* (3) illustrates this very forcibly, and also throws a light on another consideration which arises in this case. There a Hindu widow, with the consent of her daughter, sold property inherited from her husband. The daughter at the time was the next reversionary heir, and, according to the doctrine which prevails in this Presidency, if she succeeded, would take an absolute estate. Yet it was held that her concurrence was of no avail to the purchaser. The ground

(1) (1860) 8 M. I. A., 500 at p. 551. (2) (1869) 13 M. I. A. at p. 228.
(3) (1881) 5 Bom., 563.

of the decision is to be found in the following part of the judgment :—

"Now it may be taken as well established that the consent of heirs will render valid an alienation by a widow under circumstances which would otherwise not justify it. It was so held by the Privy Council as far back as the case of *Cossinath Bysak* v. *Hurroosoondree Dossee* ; but the question, who are the heirs whose consent will thus render the alienation indefeasible, has led to much conflict of decision. The principle, however, upon which that question is to be answered has, we apprehend, been laid down by the Privy Council in the case of *Raj Lukhee Debia* v. *Gokool Chunder*. Their Lordships say: 'They do not mean to impugn the authorities, &c., which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such cases must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu law.' In the present case, the plaintiffs, although distant heirs, were the heirs presumptive of Narotam at the time of the sale, entitled to succeed in the event of Vakhat dying before her mother without issue, and as such, clearly interested in disputing the sale. Nor can the mere concurrence of Bai Vakhat, albeit the nearest in succession (having regard to the state of dependence in which all women are supposed by Hindu law to have their being) be regarded as affording the slightest presumption that the alienation was a justifiable one."

Taking this, then, as the view of this Court, has there been in this case a sufficient consent to validate the sale ? Had the Judge been able to find that Bhimabai assented, it is conceded that this question would have to be answered in the affirmative, but the District Judge, leaning perhaps towards the side of caution, was unable to find her consent established. But what difference does the absence of her consent make ? The concluding portion of the passage I have just read from the judgment in *Varjivan's* case shows that it would make no difference ; for if Bhimabai's assent in this case could not be "regarded as affording the slightest presumption that the alienation was a justifiable one," obviously the absence of that consent is absolutely immaterial. So that it comes to this: whether Venkatesh's consent was not alone enough, for if not, then it was beyond the range of possibility to obtain a sufficient consent to validate the sale.

Now the value of a consent in this connection, and its effective results, must, as it appears to me, be measured by reference to

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all the circumstances of the case, and what do we find are the circumstances here? They are, in my opinion, of a very special character: as I have already shown, Venkatesh was the only male reversioner, and the only male kinsman then in existence. Therefore, he was the sole male interested in disputing the transaction, and the only person whose consent could operate to raise any presumption. The occasion for the sale no doubt was to supply the funds required for Venkatesh's marriage, but then it was this very marriage to which the plaintiff owed his being, and without which he would not have been in existence to make this claim. It is true Venkatesh did not survive Radhabai: had he done so, clearly the plaintiff's claim must have failed; and it is no doubt the fact that the plaintiff, as events turned out, was the reversioner who succeeded: but for all that I think that the circumstances of the case are of so special a character that the consent given by Venkatesh sufficed to validate Radhabai's sale.

Therefore, I would, as to Nos. 495 and 496, reverse the decree of the lower Court and dismiss the claim.

In the case of Nos. 497, 498, 499, no consent was given or legal necessity proved; therefore, as to them I would not interfere with the decree of the lower Court. Costs will be in proportion throughout.

RANADE, J.:—The dispute in this case involves a rather nice point of law regarding a reversioner's right to question a sale effected by a Hindu widow, and the extent and the operation of the law of estoppel by conduct. The five lands in dispute first belonged to one Govind Bhagwant Dorle, who died in 1857, without leaving any children but only his widow Radhabai and his sister Bhimabhai. Radhabai in 1862 sold two of the lands to defendant No. 1 for Rs. 150, and in 1864 she transferred the kháta of the other three lands to the same defendant. The respondent-plaintiff is the son of Venkatesh, who was the son of Bhimabai. Bhimabai died in 1869. Her son Venkatesh died about 1877, and Radhabai died in 1889.

In 1897 respondent-plaintiff brought this present suit to set aside the sale and transfer effected by Radhabai as having been made without legal necessity and without right, as her interest

in these lands extended only for the term of her own life. For the defence it was urged that the sale was effected for legal necessity, and with the consent and for the benefit of plaintiff's father Venkatesh who attested the deed of sale. This consent and attestation estopped the plaintiff from questioning the sale. As regards the other three lands it was urged that Radhabai transferred the kháta, as she could not pay the assessment, and that defendants took them up and were in adverse possession ever since 1864. Defendants further contended that they had spent large sums on improvements.

The Court of first instance found (1) that plaintiff was the reversionary heir of Radhabai and her husband; (2) that the sale and transfer did take place, but the sale was made without legal necessity, and the transfer without consideration; (3) in the case of all the five lands, defendants had only acquired Radhabai's life-interest, and the sale and transfer did not hold good after her death; (4) as regards the alleged legal necessity, the first Court found that the statement in the deed of sale about plaintiff's father's marriage, being the purpose for which the money was required, was not true, and that the recital did not prove itself. It was further held (5) that even if the money had been advanced for the marriage of Venkatesh, the occasion did not constitute a legal necessity, as the marriage of a sister's son did not conduce to the spiritual welfare of the husband and did not constitute a pious purpose recognised by the law. Further, it was held (6) that though plaintiff's father had attested the deed of sale, the attestation did not amount to his consent to the alienation, and this attestation did not constitute the concurrence of all the heirs which the law requires; that Bhimabai, the nearest reversioner, did not consent, and plaintiff's father was not presumptive or expectant heir at the time (1862); and (7) his consent did not estop the plaintiff, as he claimed as reversioner in his own right, and not through his father or grandmother, Bhimabai, who both died before Radhabai; (8) plaintiff's claim was not barred, as it was brought within twelve years from the death of Radhabai; (9) as regards the alleged improvements, the Court held that defendants were not entitled to claim their value. Plaintiff's claim was accordingly decreed,

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In appeal the District Judge agreed with the first Court in holding that no legal necessity for the alienation was proved. He, however, differed from the first Court in holding that plaintiff's father had consented to the alienation, but not Bhimabai, his grandmother, and that plaintiff's father's consent did not validate the alienation of the two lands sold. As regards the improvements the District Judge held that defendants were entitled to recover their value from the plaintiff. He accordingly amended the decree of the lower Court and granted possession of the lands after plaintiff had paid to the defendants the value of the improvements made.

In second appeal before us, the principal point raised was that legal necessity was proved for the alienation of the two lands sold, and that the consent of plaintiff's father validated the alienation made before the plaintiff was born, and this consent of his father bound the plaintiff, and estopped him from disputing the alienation. So far as the contention in appeal rests on the allegation of legal necessity, the concurrent findings of both Courts must be accepted as final, and it must be held that Radhabai was under no legal necessity when she sold two of the lands and transferred the other three.

The question at issue in appeal is thus confined to the legal consequence of the assent of Venkatesh showed by his attestation of Radhabai's deed of sale. This question did not arise in the Court of first instance, which held that the attestation did not signify consent and was not binding on the plaintiff who sued in his own right as reversioner at the time of Radhabai's death. The lower Appellate Court, however, held it proved that the attestation taken along with other circumstances did indicate that Venkatesh consented to the alienation. Not only was he present when the deed was executed, but he received the purchase-money which was given to him for the expenses of his own marriage. He was at the time the only male relative of Radhabai alive. He was twenty-three years old and was performing kulkarni's work himself. The Courts below have not noticed the fact, but it appears that Venkatesh not only attested the deed of sale, but he attested also the sarkatnáma, Exhibit 94, of 2nd July, 1862, and the rajináma, Exhibit 92, of 9th July, 1864, and Radhabai sold to him

her kulkarni vatan in 1871, Exhibit 95, just as she sold or transferred these five lands to defendant. These are the circumstances to which the lower Court apparently referred as justifying the conclusion that Venkatesh, who was the only male reversionary heir of Radhabai, assented to the out-and-out sale of these lands to defendant. The District Judge admits that Venkatesh would have been estopped from denying the alienation himself, but he thinks plaintiff was not so estopped. He gives two reasons for this view: first, that Bhimabai's concurrence was not proved and her concurrence along with Venkatesh was necessary to validate the sale; and second, as Venkatesh died before Radhabai he never had a vested interest in the property, while plaintiff, who survived Radhabai, obtained such interest, not as Venkatesh's son, but as Govind's reversionary heir. Both these reasons do not seem to me to be very cogent. Bhimabai must have been agreeable to Venkatesh's desire to secure the help for his marriage, and Venkatesh must have acted as the male head of his family. The consent of the kindred necessary to validate a widow's alienation no doubt requires that all the kindred should join who are interested to dispute the transaction—*Raj Lukhee Debia* v. *Gokool Chunder Chowdhry*[1]. The concurrence must be such as to raise a presumption that the alienation was proper, and for justifiable purposes. The Bengal theory that the widow's interest was a life-interest, and that her surrender or release of that interest to the next reversioner accelerates his obtaining the full title, has never met with much acceptance on this side of India. Our leading case—*Varjivan Rangji* v. *Ghelji Gokaldas*[2]—lays down that the consent must be of all the kindred, but this does not mean that every single member who is a kindred must actually join in the conveyance. In *Phool Chund Lall* v. *Rughoobuns Suhaye*[3], the consent of the next male heir after the widow was held sufficient. The Privy Council decisions commencing with *The Collector of Masulipatam* v. *Cavaly Vencata*[4], *Raj Lukhee Debia* v. *Gokool Chunder Chowdhry*[5] and the other cases noted in Mayne's Hindu Law,

(1) (1869) 13 M. I. A. 209.
(2) (1881) 5 Bom., 563.
(3) (1868) 9 Cal. W. R., 108.
(4) (1864) 8 M. I. A., 529.
(5) (1869) 13 M. I. A., 223.

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sec. 591, support the view that the consent of the reversioners must be of such kindred, the absence of whose opposition raises a presumption that the alienation was a fair and proper one. The consent of kindred in the matter of adoption in those provinces, where such consent is required, stands on the same footing—*The Collector of Madura* v. *Moottoo Ramalinga*(1). The consent of every kinsman is not essential. There should be evidence of the assent of such kinsmen as suffices to show that the widow's act was *bonâ fide* and proper—*Karunabdhi Ganesh* v. *Gopala*(2). Judging from this analogy, it is clear that Bhimabai's family was represented by its only male member Venkatesh, and his consent was the consent of every one interested in disputing the alienation. It is only on the theory of life-estates being surrendered in favour of reversioners that the assent of every possible expectant kindred would be necessary, but that view has been chiefly confined to Bengal, and there has been some conflict of opinion there as to how far the remoter reversioner is bound by the act of the next reversioner—*Ram Chunder* v. *Hari Das* (3); *Behari Lal* v. *Madho Lal*(4); *Hem Chunder* v. *Sarnamoyi Debi*(5); *Raj Bullubh Sen* v. *Oomesh Chunder* (6); *Noferdoss Roy* v. *Modhu Soondari*(7); *Gopeenath Mookerjee* v. *Kally Doss Mullick*(8); *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (9); *Radha Shyam Sircar* v. *Joy Ram Senapati* (10). Apparently the Bengal view of surrender or release has been approved also by the Allahabad High Court —*Ramphal Rai* v. *Tula Kuari*(11), but not in Bombay, where the view taken by the Privy Council has been followed and the assent of all such reversioners is necessary as establishing the propriety and fairness of the alienation. The assent of Venkatesh represented both the assent of himself and Bhimabai, as their interests were common in this matter.

The question still remains whether in the event that had happened, *viz.*, that of Venkatesh and Bhimabai both dying before

(1) (1868) 12 M. I. A., 397.
(2) (1880) L. R., 7 I. A., 173.
(3) (1882) 9 Cal., 463.
(4) (1891) 19 Cal., 236.
(5) (1894) 22 Cal., 354.
(6) (1878) 5 Cal., 44.
(7) (1880) 5 Cal., 732.
(8) (1883) 10 Cal., 225.
(9) (1884) 10 Cal., 1102.
(10) (1890) 17 Cal., 896.
(11) (1885) 6 All., 116.

Radhabai, and plaintiff alone surviving as her reversionary heir, the assent of Venkatesh was binding on the plaintiff. If, as the Judge held, it would have bound Venkatesh if he had survived, I see no reason why the plaintiff should not be estopped likewise. In the course of the arguments I suggested to the respondent's pleader what would have been the result if Radhabai had, instead of spending the money on Venkatesh's marriage, used it for building a house for Venkatesh, and plaintiff enjoyed the use of the house after Venkatesh. In such a case as this, would it have been open to plaintiff to question the sale by Radhabai and retain the house she built for Venkatesh out of the proceeds? There could be only one answer to such a question. In *Luchmun Chunder* v. *Kalli Churn Singh* [1], their Lordships held that where a husband represented during his life that certain property belonged to his wife, it was held that a purchaser from the wife could not be turned out by the heirs of the husband, who traced their title from the father and not the mother. In *Sarat Chunder Dey* v. *Gopal Chunder Laha* [2], their Lordships discussed the whole question of estoppel. They distinguished the case from *Hira Singh* v. *Ganga Sahai* [3] in which it was suggested that the chief ground in cases of estoppel is fraudulent misrepresentation. Besides fraud there may be an estoppel by negligence, where a third person is led to act by the negligent representation of any one. Besides negligence and fraud, estoppel may be by circumstances. In the case to which this report refers, A, as agent on behalf of his mother B, executed a mortgage in favour of C. Subsequently he succeeded as heir to his father, and questioned the mother's disposition on the ground that she had no interest, and it was held that A was estopped. The present case does not in all respects resemble the facts to which the Privy Council ruling referred, but the principle of the ruling seems applicable. Plaintiff, who was not even born when the alienation took place, seeks to set aside Radhabai's disposition which was effected for the benefit of plaintiff's father and to which his father gave his assent as representing the reversioner's family. He must, therefore, be held to be bound by the conduct of the father, even

(1) (1878) 19 Cal. W. R., 292. (2) (1892) 20 Cal., 296.
(3) (1883) 6 All., 322.

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though technically he succeeded as reversioner in his own right just as in the other case the son succeeded in the right of his father and not through his mother. The ruling in *Sia Dasi* v. *Gur Sahai*[1] shows how the doctrine of estoppel works in such matter. In this view of the law I am inclined to hold that the alienation of the two lands sold by Radhabai, being assented to by the chief reversionary heir, bound the plaintiff.

There is no such equity to protect the appellants in respect of the other three lands. I would, therefore, confirm the decree in regard to them and dismiss plaintiff's claim in regard to the lands Nos. 495 and 496 with costs in proportion throughout.

*Decree varied.*

(1) (1880) 3 All., 362.

## APPELLATE CIVIL.

*Before Mr. Justice Fulton and Mr. Justice Batty.*

1900. *August 6.*

MUNICIPALITY OF PAROLA (ORIGINAL DEFENDANT), APPELLANT, *v.* LAKSHMANDAS SUPADUBHAI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Municipality—District Municipal Act (Bom. Act II of 1884), Sec. 48—Suit against Municipality for declaration and injunction—Notice of action.*

The plaintiffs sued the Municipality of Parola to obtain a declaration that a certain building erected by them had been built in accordance with, and not in contravention of, orders issued by the Municipality, and further, to obtain an injunction restraining the Municipality from pulling it down. The Municipality contended (*inter alia*) that the suit was not maintainable, as no notice of the suit had been given as required by section 48 of the District Municipal Act (Bom. Act II of 1884).

*Held*, that notice was not made an indispensable preliminary to such a suit by section 48 of the Act.

SECOND appeal from the decision of Ráo Bahádur Vaman M. Bodas, First Class Subordinate Judge of Dhulia with appellate powers, confirming the decree of Ráo Sáheb G. V. Patvardhan, Subordinate Judge of Amalner in the Khándesh District.

* Second Appeal, No. 88 of 1900.

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The plaintiffs sued to obtain a declaration that they had built a certain privy according to, and not in contravention of, the orders of the defendant Municipality and an injunction restraining the defendant from pulling it down. They alleged that they had built on a piece of ground lying to the east of their house and measuring ten feet east to west and eight feet north to south in accordance with the permission of the Municipality granted on the 1st and 10th May, 1897. The Municipality, however, on the 13th December, 1897, issued a notice to the plaintiffs calling upon them to pull down the privy on the ground of its being built contrary to their orders.

The Subordinate Judge found that the plaintiffs had built according to, and not in contravention of, the orders of the defendant, and he granted the injunction.

The Municipality appealed, urging for the first time that the suit was not maintainable, inasmuch as no notice under section 48[1] of the Bombay District Municipal Act (Bom. Act II of 1884) had been given. The Judge confirmed the decree, holding that no notice was necessary under that section. He held also that the plaintiff had built in accordance with the permission of the Municipality.

The defendant preferred a second appeal.

*Daji A. Khare*, for the appellant (defendant):—The plaintiff should have given notice under section 48. The suits in which it has been held that section 48 does not apply are suits in the nature of ejectment suits, or which relate to an act done by the officers of a Municipality beyond its powers—*Kashinath*

(1) Section 48 of the District Municipal Act (Bom. Act II of 1884):—

48. No action shall be commenced against any municipality or against any officer or servant of a municipality, or any person acting under the orders of a municipality, for anything done, or purporting to have been done, in pursuance of this Act, or of the principal Act, without giving to such municipality, officer, servant, or person one month's previous notice in writing of the intended action and of the cause thereof, nor after three months from the date of the act complained of;

and in the case of any such action for damages, if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than the amount so tendered and shall pay all costs incurred by the defendant after such tender.

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*Keshav Joshi* v. *Gangabai*[1]; *Manohar Ganesh* v. *Dákor Municipality*[2]; *Shidmallappa* v. *Gokák Municipality*[3]; *Harilal* v. *Himat*[4]. The ruling in *Ranchod* v. *The Municipality of Dákor*[5] decides that the object of section 86 of the Municipal Act (Bom. Act VI of 1873) was to give the Municipality an opportunity of tendering sufficient amends for an illegal act done *bonâ fide* in the discharge of public duties, before being harassed with an action. That ruling further lays down that section 86 was not confined to an action for damages only. We submit that this principle should be adopted in construing section 48 of the present Act. The plans show that the plaintiffs have exceeded the area for which they got permission.

*Mahadeo V. Bhat*, for the respondents (plaintiffs) :—The object of section 48 of the District Municipal Act is to shorten the time within which pecuniary claims for compensation for wrongful acts done by the Municipality in carrying out the Act can be brought, and to give the Municipality timely notice of such actions to enable them to consider their position and tender amends. We, therefore, submit that the section is not applicable to our present claim in which we seek an injunction and a declaration that the privy was built in accordance with the permission granted by the Municipality. It was not necessary for us to give to the defendant a notice of action. The considerations which induced the Court to hold that section 48 is not applicable to suits in ejectment based on title hold good in suits for a declaration and injunction. Both the lower Courts have found as a fact that the plaintiffs have built in accordance with the permission given by the defendants.

BATTY, J.:—In this case the plaintiffs sued the Municipality of Parola to obtain a declaration that a privy built by the plaintiffs had been built in accordance with, and not in contravention of, orders issued by the said Municipality, and further to obtain an injunction restraining the defendant, the Municipality, from pulling down the said privy.

(1) (1896) 22 Bom., 283.
(2) (1896) 22 Bom., 289.
(3) (1897) 22 Bom., 605.
(4) (1897) 22 Bom., 636.
(5) (1884) 8 Bom., 421.

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The Municipality, in the Court of first instance, replied that the privy built was not in accordance with the orders issued, and the issue thus raised having been decided against the Municipality in that Court, objected in their memorandum of appeal to the lower Appellate Court that, under section 48 of the Bombay Act II of 1884, the suit was not maintainable, as no notice of the suit had been given as required by that section, and further contended that the permission given by them for the building had been misconstrued in the lower Court; and that as the building was not in accordance with that permission, it was liable, under the provisions of the Act, to be demolished on the requisition of the Municipality.

The lower Appellate Court confirmed the decree of the lower Court, finding on the facts that the building was not erected in contravention of the orders issued, and also that under the ruling in *Shidmallappa* v. *Gokák Municipality*(1) no notice was required in such a case by section 48 of the Amending Act of 1884.

It has been strenuously contended for the appellant-Municipality, that the rulings in *Kashinath Keshav Joshi* v. *Gangabai*(2), in *Manohar Ganesh Tambekar* v. *Dákor Municipality*(3), in *Shidmallappa Nurandappa* v. *Gokák Municipality*(4), and in *Harilal Ranchodlal* v. *Himat Manekchand*(5) go no further than to show that section 48 of Bombay Act II of 1884 is inapplicable only in cases where the action brought is in the nature of a suit for ejectment, or is in respect of an act which does not purport to have been done in pursuance of the statutory powers conferred on the Municipality.

The wording of section 240 of Bombay Act II of 1865, on which the ruling in *Sorabji Nassarvanji* v. *The Justices of the Peace for the City of Bombay*(6) was given, clearly contemplated cases for monetary compensation for a wrongful act only. And in one of the cases therein cited—*Price* v. *Khelat*(7)—it was

(1) (1897) 22 Bom., 605.
(2) (1896) 22 Bom., 283.
(3) (1896) 22 Bom., 289.
(4) (1897) 22 Bom., 605.
(5) (1897) 22 Bom., 636.
(6) (1875) 12 Bom. H. C. R, O. C. J., 250. *Vide* pp. 254, 255.
(7) (1870) 5 Ben. L. R., Appx., 50; 13 Cal. W. R., 461.

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observed on an analogous section, that probably it was intended to apply to suits for damages only. In another case—*Poorno Chunder Roy* v. *H. Balfour*[1]—also cited in *Sorabji Nassarvanji* v. *The Justices of the Peace for the City of Bombay*, Phear, J., thought "it reasonable to suppose that the section (87 of Bengal Act III of 1864) was directed solely to the cases of suits brought against the Commissioners for damages consequential on the *act done* by them." The same view was taken of this section in the case of *Chunder Sikhur* v. *Obhoy Churn*[2], where it was held that the section was "applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act done by the Commissioners or their officers, in the exercise, or the honestly supposed exercise, of their statutory powers;" and it was added that "the notice is meant to give the defendant an opportunity of making some pecuniary amends for the wrong, without incurring the costs of litigation." To a similar effect is the ruling in *Municipal Committee of Moradabad* v. *Chatri Singh*[3].

In the case of *Joharmal* v. *The Municipality of Ahmednagar* [4] section 86 of Bombay Act VI of 1873, repealed and replaced by section 48 of Bombay Act II of 1884, was held applicable *only* to suits for damages; and the case of *Sorabji Nassarwanji* v. *The Justices of the Peace for the City of Bombay* was considered applicable as dealing with an enactment (section 240 of Bombay Act II of 1865) analogous to section 86 of Bombay Act VI of 1873. In the case of *Shahebzadee Shahunshah Begum* v. *Fergusson* [5] a similar view was taken of section 424 of the Civil Procedure Code as a section entitling public officers to notice when sued for damages for some wrong inadvertently committed in the discharge of official duties, the object being to give the officers or public body sued an opportunity of setting matters right, making amends, restoring what has been taken, or paying for the damages which have been done. The decision in the case of *Ranchhod Varajbhai* v. *Municipality of Dákor* [6] dealing with section 86 of Bombay Act VI of 1873, while accept-

(1) (1868) Cal. 9 W. R., 535.
(2) (1880) 6 Cal., 8.
(3) (1873) 1 All., 269.
(4) (1878) 6 Bom., 580.
(5) (1881) 7 Cal., 499.
(6) (1884) 8 Bom., 421.

ing the view that the object of the provision was to give an opportunity of tendering sufficient amends, declared that the section was not confined to an action of damages, but was applicable to *every* claim of a *pecuniary* character arising out of the acts of municipal bodies or officers, who in the *bonâ fide* discharge of their public duties may have committed illegalities not justified by their powers. This somewhat wider construction of the section, now repealed, still required that, whether the action sounded in damages or not, it must, in order to render notice necessary, be for some *act done* in exercise of powers conferred by the enactment. So also in *Mayandi* v. *McQuhae*[1] interpreting section 168 of the Madras Town Improvement Act, 1871, which required notice "when a suit is brought against the Commissioners * * * for anything done under the Act", it was held that no notice was requisite in a suit to recover the balance due under a *contract*, for a breach of contract was not to be regarded as a thing *done under the Act*. This decision it may be useful to compare with that in *Selmes* v. *Judge* [2] where the question arose on a section similarly worded, and it was held that a suit to recover back money paid on an assessment of a highway rate made under colour of the Acts 5 and 6, William IV, cap. 50, required preliminary notice, the collection, though illegal, being made in supposed pursuance of the powers thereby conferred.

The case of *Midland Railway Company* v. *Local Board of Withington*[3] seems to go somewhat further in this direction: for there the notice was held necessary in a suit to recover back, as money had and received, sums which had been paid to the Local Board as charges for the repair by them of a road for which the plaintiffs had mistakenly been regarded as responsible. Lindley, L. J., observed that it had been argued that no physical power had been put in force, but that this was a vicious argument, and that he could not follow it. Probably, however, the thing done under the Act in that case, which was regarded as giving the cause of action to the plaintiffs, was not the voluntary payment

(1) (1878) 2 Mad., 124. (2) (1871) L. R., 6 Q. B., 724.
(3) (1883) 11 Q. B. D., 788.

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by them of the money, but the action of the Board in undertaking the repair of the road in question at the plaintiffs' charges.

In *Nagusha* v. *The Municipality of Sholápur*[1] it was held that, under section 48 of Bombay Act II of 1884 (the section now in question), the mere circumstance that an act done under the Act had rendered the suit necessary, would suffice to bring into operation the provisions of that section requiring notice before suit. But in that suit though one of the acts called in question may have been done under the Act, the suit was not strictly speaking an action for an act done under the Act, but on account of the continuance in possession, and assertion of title, by the Municipality, which it was impossible to regard as in pursuance of the statutory powers. The decision in the last mentioned case, therefore, having been questioned in *Kashinath Keshav Joshi* v. *Gangabai*[2] was definitely overruled in the Full Bench case of *Manohar Ganesh* v. *Dákor Municipality*[3], in which, though it was recognised that section 48 might apply to suits other than suits for damages, it was held that it could not apply to actions of ejectment based on title. Indeed in that case Hosking, J., pointed out that the only powers under the Act, by virtue of which a Municipality could take and retain possession of land, were coupled with special provision for compensation payable. The result of this case suggests that it is not sufficient that an act done under the statutory powers should have given occasion to the plaintiff to seek redress, but that it was further necessary that the redress sought, *i. e.*, the action itself, should be *for* the act so done and for nothing further. The case of *Shidmallappa* v. *Gokák Municipality*[4] carries the principle a step further and rules that a suit for damages for the demolition of a wall by the Municipality in exercise of its statutory powers would require notice under section 48 of Bombay Act II of 1884, but that to recover possession of the site and to obtain an injunction against interference therewith, the plaintiff could sue without notice. In the judgment, the case of *Flower* v. *The Local Board of Low Leyton*[5] was cited as showing that an injunction is

(1) (1892) 18 Bom., 19.
(2) (1896) 22 Bom., 283.
(3) (1896) 22 Bom., 289.
(4) (1897) 22 Bom., 605.
(5) (1877) 5 Ch. D., 347.

merely ancillary to the ejectment suit in respect of which notice was unnecessary.

In a still later case—*Harilal Ranchodlal* v. *Himat*[1]—the suit was for an injunction without any prayer for ejectment, and though the Court observed that the suit was not for anything done in pursuance of the Act, it was also further stated that the sections conversant with this subject have always been held not to apply to actions for an injunction. In support of this position, in addition to cases above referred to, the Court cited *President of the Taluk Board, Sivaganga* v. *Narayanan*[2]. In that last mentioned case the defendant Board had called on the plaintiff to remove a wall alleged to be an obstruction, giving notice that on his default the Board would demolish it. The section referred to (section 156 of the Local Boards Act, Madras, 1884), was in its terms similar to section 48 of Bombay Act II of 1884, and was held not to require notice in such a case. In the case of *Flower* v. *Local Board of Low Leyton*[3], above mentioned, the principle is more unmistakeably stated. There Jessel, M. R., observed that the real object of the action was to prevent the continuance of an intolerable nuisance which plaintiff said he had suffered through the acts of the defendants—acts which apparently depended on the exercise of their statutory powers. The section (38 and 39, Vict., cap. 55, sec. 264), requiring notice for anything done or intended to be done or omitted to be done under the provisions of this Act, it was held, was intended to apply to an action at law for damages, and its object was to give an opportunity to a local authority to make payment or tender of compensation for the damage sustained, but could not be intended to apply to a case where the local authority was improperly pulling down a house, for instance, or stopping up a sewer; and if that were so, it was added, it would amount to a license to every Local Board to do what injury they pleased while the month's notice was running. This ruling has now been superseded by 56 and 57, Vict., cap. 61, sec. 1, which, instead of requiring notice, provides (in respect of actions for *damages*) in clause (*d*), that if in the opinion of the Court the plaintiff has not given the

(1) (1897) 22 Bom., 636. (2) (1892) 16 Mad., 317.

(3) (1877) 5 Ch. D., 347.

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defendant a sufficient opportunity of tendering amends before the commencement of the proceeding, the Court may award to the defendant costs.

The result of the cases above cited appears to indicate, that for the purposes of section 48 what the Court has to look to is the real object of the suit, and the section requires notice only when the suit is for an act already done or purporting to have been already done, under the powers conferred. In such case only can it be necessary for the plaintiff to give an opportunity to make amends or compensation, and in such cases, the delay necessitated by notice is comparatively immaterial. But when the suit is not for an act already done, but to prevent an act from being irremediably, irrevocably done, neither can amends be claimable, nor can delay be obligatory. It is impossible to hold that a mere notice, a requisition or a threat to do a thing in the future, even though it be issued or made under the powers, is an act already done, or purporting to have been done; and there is nothing else alleged in this case that can be alleged to have been done by the Municipality. A notice, therefore, does not appear to have been made an indispensable preliminary to such a suit, by section 48 of the Act.

The question whether the erection now in dispute was constructed in contravention of the conditions annexed by the Municipality to their permission, has been decided by both of the lower Courts in the negative. If that decision can be regarded as one solely on the facts, it could not now be impugned on second appeal. If, however, it can be regarded as a question of law, it would suffice to observe that whether the Municipality purported to act under section 33 or under clause 2 of section 39 of Bombay Act VI of 1873, their orders and directions can only be construed so as to operate with a definite and legal effect. It has been found by the lower Courts that the orders passed could not so operate, for while on the one hand they authorized the construction of the building in question on a space measuring 10 feet by 8 feet from given boundaries, they directed, on the other hand, that it should not extend beyond a certain limit which according to their contention is within the measured space to which their permission in terms extended. Their orders were, therefore,

according to their own contention and the facts found, inconsistent and incapable of performance; and it is impossible for them to contend that the building which has been erected in compliance with thepermission accorded, is in contravention thereof because it did not also conform to a direction utterly irreconcileable with that permission. Neither the law nor any direction purporting to be made under the law can compel any person to do what is impossible; and a permission which involves a condition absolutely inconsistent with its own terms could not come within the category of legal orders. The lower Courts, however, have concurred in finding that the permission given is, in reference to the facts established, susceptible of but one interpretation, and that the building erected by the plaintiff is not in contravention of the permission so interpreted. On these grounds the appeal must be rejected and the decrees of the lower Courts must be confirmed with costs.

FULTON, J.:—I concur.

*Decrees confirmed.*

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# FULL BENCH.

## CRIMINAL REVISION.

*Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Ranade, Mr. Justice Fulton, Mr. Justice Crowe and Mr. Justice Batty.*

CHHOTALAL LALLUBHAI (ORIGINAL COMPLAINANT), APPLICANT, *v.* NATHABHAI BECHAR AND ANOTHER (ORIGINAL ACCUSED), OPPONENTS.*

1900. *August 7.*

*Criminal Procedure Code (Act V of 1898), Sec. 4 (h), Chap. XV, Part B, Secs. 191, 195, 196, 198, 199, and Sec. 345—Penal Code (Act XLV of 1860), Sec. 499, Explanation I—Defamation of wife—Complaint by husband—Aggrieved party.*

*Held* by the Full Bench (Ranade, J., dissenting) that under the provisions of the Criminal Procedure Code (Act V of 1898) a husband is entitled to be complainant where the alleged offence is defamation, imputing unchastity to his wife.

* Criminal Application for Revision, No. 70 of 1900.

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APPLICATION for revision under section 435 of the Criminal Procedure Code (Act V of 1898) against an order passed by F. X. DeSouza, Sessions Judge of Ahmedabad.

The complainant Chhotalal Lallubhai lodged a complaint in the Court of the City Magistrate of Ahmedabad against Nathabhai Bechar and Ambashankar Dalsukhram charging them with having defamed his (complainant's) wife by imputing unchastity to her.

The Magistrate on the authority of *Imperatrix* v. *Kustantin John de Souza* (1) discharged the accused under section 253 of the Criminal Procedure Code (Act V of 1898). The following is an extract from his judgment:—

"If the husband of a woman can be considered to be aggrieved when her chastity be called in question, why should not her parents, brothers, sisters and children be considered, if not more at least as much, aggrieved as the husband himself? The reputation of the parents, I should think, suffers greater injury, and the reputation and the prospects of the brothers, sisters and children suffer greater harm from a social point of view as regards marriage and other caste matters, than the reputation and prospect of the husband. A woman married or a widow or a virgin may in some cases be living with her old decrepit father or mother, or a sickly brother, or sister or a son or daughter of tender years, and may be the sole person on whom such a relative could depend for his or her nursing and care. In the event of her being defamed, can the law permit such a relation to file a complaint on the grounds that his or her reputation has suffered injury, and that in the event of the woman being outcasted he or she would not be able to live with her, would not for some reason or other be able to secure the aid and care of another nurse in her place, would not be able to obtain protection from another relative, and would consequently suffer harm in body or mind or both? When once the boundary laid down by law is crossed, where should the limit be fixed and to what degree of relationship should the privilege of bringing a complaint be extended or restricted? I think it would not be proper according to law to allow any such relative to be complainant. Why should, then, the husband be allowed to claim a greater privilege?

"The offence of defamation is compoundable: *vide* section 345, Criminal Procedure Code. The only person who can compound it is 'the person defamed.' Hundreds of cases may be conceived in which a husband may be quite anxious to run to Court for defamation of his wife, but the wife herself may be quite averse

(1) Criminal Rulings of the Bom. H. C. R., No. 14 of 1887—

*Held* (West and Birdwood, JJ.) that, in a case of defamation of a female, it is she herself, and not a male relative, who should make a complaint under section 198 of the Criminal Procedure Code (Act X of 1882).

to such a course. Who can, in the event of a complaint being filed, then compound the offence? The wife and not the husband. When, then, once the provisions of section 198, Criminal Procedure Code, are made elastic to suit the convenience of the husband, why should those of section 345, Criminal Procedure Code, not be made equally so? And would such a course be legal and proper? I am respectfully of opinion that it would not be."

The Sessions Court at Ahmedabad having confirmed the Magistrate's order of discharge, the complainant applied to the High Court in its extraordinary jurisdiction (section 435 of the Criminal Procedure Code, Act V of 1898) and obtained a rule *nisi* calling on the accused to show cause why the order of the Sessions Judge should not be set aside.

*Lallubhai A. Shah* appeared for the complainant in support of the rule.

There was no appearance for the opponents (accused).

The case was argued before a Division Bench composed of Fulton and Crowe, JJ., which referred it to a Full Bench. The following was the referring judgment :—

FULTON, J.:—We are inclined to agree with the decision of the Madras High Court in *Chellam Naidu* v. *Ramasami*[1] that when a married woman is defamed by the imputation of unchastity, her husband is a person aggrieved upon whose complaint the Magistrate may take cognizance of the case under section 198 of the Criminal Procedure Code. It seems to us that such an imputation made by a third person concerning the wife causes a direct injury to the honour and reputation of the husband.

But we find that in Criminal Reference No. 14 of 1887 this Court came to a contrary decision, and as it seems impossible to distinguish that case from the present, we have decided to refer the question to a Full Bench.

The question being thus referred, it was argued before the Full Bench composed of Jenkins, C. J., Ranade, Fulton, Crowe and Batty, JJ.

*Lallubhai A. Shah*, for the complainant:—We say that a husband is a party 'aggrieved' within the meaning of section 198 of the Criminal Procedure Code. The use of the words "some person" in the section shows that the Legislature did not intend to

(1) (1891) 14 Mad., 379.

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limit the right only to the person actually defamed. The word 'aggrieved' also does not mean only the person against whom and in respect of whom the defamatory matter is published; it means any person who is in any way concerned in, and affected by, the publication. The general rule in criminal matters is that any person who has the knowledge of the facts constituting an offence can lodge a complaint—section 190 of the Criminal Procedure Code; *In Re Ganesh Narayan Sathe* (1). The words in section 198 should be liberally construed. Criminal law regards the husband and wife as one person: see sections 216 and 216A of the Indian Penal Code. There are only two rulings on this point, namely, *Imperatrix* v. *Kustantin John de Souza* (2) and *Chellam Naidu* v. *Ramasami* (3). In the first case there is no written judgment, and no reasons are given in support of the ruling. The second supports our contention. The ruling in *Brahmanna* v. *Ramakrishna* (4) does not touch the point.

[JENKINS, C. J.:—Does not the defamation of the wife in this case, that she is unchaste and adulterous, amount to defamation of the husband, inasmuch as it might affect his reputation and *status* in the caste?]

We submit that it would be defamation of the husband, and he would certainly be an 'aggrieved' party within the meaning of section 198 of the Criminal Procedure Code.

There was no appearance for the opponents (accused) to show cause against the rule.

The judgment of the Full Bench (Ranade, J., dissenting) was delivered by

JENKINS, C. J. (Fulton, Crowe and Batty, JJ., concurring):—The question arising on this reference is whether, under the provisions of the Code of Criminal Procedure, a husband is entitled to be complainant where the alleged offence is defamation imputing to his wife unchastity.

The solution of this question turns on the meaning to be ascribed to the expression in section 198 of the Code "by some

(1) (1889) 13 Bom., 600.
(2) (1887) Cr. Rul. No. 14.
(3) (1891) 14 Mad., 379.
(4) (1894) 18 Mad., 250.

person aggrieved by such offence." The referring Bench favoured the view that the husband could complain, but were pressed by an earlier unreported decision of this Court where the opposite view was taken; hence this present reference.

Now it will be as well, in the first place, to examine the general scheme of the Code with reference to the initiation of proceedings by complaint. The nature of a complaint we learn from section 4 (*h*), which provides that "'complaint' means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence."

Part B of Chapter XV of the Code deals with the conditions requisite for the initiation of proceedings, and by section 190 it is enacted that "except as hereinafter provided, any Presidency Magistrate, District Magistrate, or Sub-Divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence upon receiving a complaint of facts which constitute such offence." So far there is no limitation as to the person who can complain. By sections 195, 196, 198 and 199 the capacity to complain in respect of certain specified offences is limited to the persons described in those sections. Thus we find that under section 198 the Court cannot take cognizance of the offence of defamation "except upon a complaint made by some person aggrieved by such offence." A consideration of the offences named in sections 198 and 199 makes clear what the motive for the restriction is. The offences named in section 198, *e. g.*, are (1) criminal breach of contracts of service, (2) defamation and (3) the offences relating to marriage except adultery and enticing or taking away or detaining with a criminal intent a married woman. The offences of adultery and enticing away, &c., a married woman require under section 199 that the complaint should be made by the husband, or, in his absence, by some one who had care of her on his behalf. All these offences are obviously of a private character, and hence the limit on the persons by whom initiation of proceedings is allowed; for it would be eminently undesirable that any one should have it in his power to drag into a Court of justice offences of

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this sort, and that I take to be mischief against which it is sought to guard.

Now it does not appear to me that a husband complaining of an imputation of unchastity on his wife's part would *primâ facie* come within the mischief; and I think one is entitled to approach the question in the light of this consideration, and to ask whether there is anything in the expression 'some person aggrieved by such offence' that excludes him from being a competent complainant. I am unable to find in the Code any limitation of the sense in which the word 'aggrieved' is used. Nor is there any indication of the kind of grievance which may qualify a man to complain. Still I think it must be conceded that any fanciful or sentimental grievance would not suffice: it must be such a grievance as the law can appreciate: it must be what has been termed a legal grievance and not a *stat pro ratione voluntas* reason.

Is, then, an imputation of unchastity in his wife a legal grievance to a husband? It appears to me that *a priori* it clearly is, though there no doubt may be special circumstances under which it would not be. Whether or not such special circumstances exist, is a question for determination on the facts of each case as it arises. My reason for saying that such an imputation is *primâ facie* a legal grievance to the husband is this; it is a grievance capable of recognition by a Court of justice; for it is one that will entitle him to recover such special damages as may have resulted to him from it; and as has been said, "the reputation of a husband is so intimately connected with that of his wife, that he has always been allowed to sue whenever he has received damage just as though the words had been spoken of himself." Moreover, common experience of life shows that a husband under ordinary circumstances suffers by the evil reputation of his wife. Obviously, then, the grievance to the husband cannot be described as merely sentimental.

It seems to me impossible to limit the scope of the expression "some person aggrieved" to those by whom an offence may under section 345 of the Code of Criminal Procedure be compounded. If that were the true view, then it is only the person defamed

who can complain. But in that case Explanation I to section 499 of the Indian Penal Code (Act XLV of 1860) becomes a dead letter. That explanation makes the defamation of a deceased person an offence; but if it is only the person defamed who can complain, it follows that there is no one who can initiate proceedings, and that I cannot suppose was ever intended, or can be the actual result of section 198.

The view, too, that the capacity to complain is not limited by section 345 finds, I think, some support in the form of the expression "some person aggrieved".

The conclusion, then, to which I come is, first, that the expression "some person aggrieved" is not necessarily limited to the person defamed, and secondly that *primâ facie* a husband is a person aggrieved by an imputation of unchastity to his wife with whom he is living, and I would so answer the question referred.

I have not referred to the decided cases, for it appears to me that our office sitting here as a Full Bench is to ascertain the meaning of the Code. Still it will not be inappropriate to point out, as in some measure favouring the conclusion I have expressed, that the only reported case on the point prior to the recent re-enactment of the Criminal Procedure Code was that of *Chellam Naidu* [1], in which a husband was held to be a person aggrieved by the imputation of unchastity to his wife. Yet with that decision before them the framers of the new Code deemed no amendment necessary, a fact which, so far as it goes, favours the conclusion at which I have arrived.

RANADE, J.:—The question referred to the Full Bench is whether the husband of a married woman, who is defamed by the imputation of unchastity, can be regarded as a "person aggrieved" within the meaning of section 198 of the Criminal Procedure Code, which provides that no Court shall take cognizance of an offence under Chapter XXI, Indian Penal Code, except upon a complaint made by some person aggrieved by such offence. The Judges of the Division Bench, who made the reference, were inclined to agree with the decision in *Chellam Naidu* v. *Ramasami* [2] in which it was held that when a married woman is

(1) (1891) 14 Mad., 379. (2) (1891) 14 Mad., 379.

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defamed by the imputation of unchastity, her husband is a person aggrieved within the meaning of section 198 of the Criminal Procedure Code.

In a later case (*Brahmanna* v. *Ramakrishna*[1]) which related to a civil suit brought by a person to recover damages caused by an imputation that his wife had committed adultery with a *Paria*, and that her children were born of that *Paria*, Justice Muttuswami Ayyer said that there was no occasion to depart from the rule that the person who is defamed or slandered ought to sue, and that as plaintiff's wife was *sui juris* no other person was permitted to sue. In so deciding this point, Justice Ayyer relied upon a previous decision (*Subbaiyar* v. *Kristnaiyar*[2]) which also related to a civil suit, and reference was made to *Daya* v. *Paramsukh*[3] and *Luckumsey* v. *Hurbun*[4], in the first of which cases a father was not allowed to sue for the defamation of his daughter, and in the second a *bhauband* of a deceased person was held not entitled to sue for the defamation of that person. These decisions in civil suits are of course not strictly applicable in the present case, which relates to a criminal proceeding, and the point in dispute is confined to the interpretation of the word "aggrieved" used in section 198 of the Criminal Procedure Code. These decisions, however, suggest the principle which ought to govern the relations of wife and husband in complaints of defamation. If the husband of the slandered person is not permitted to sue for the imputation on his wife's character, it cannot be assumed that, in the absence of special injury to himself, the husband would be permitted to make a complaint in respect of a slander of his wife. The force of the Madras decision in *Chellam Naidu* v. *Ramasami*[5] is thus considerably shaken by the later decision.

In Bombay the understanding has always been that none other but the female defamed, and not her male relations, can bring the complaint. See *Imp.* v. *Kustantin John de Souza*[6]. The order passed in this last case is very brief and gives no reasons, but it may be safely gathered that the Judges, who disposed of the criminal reference, must have thought the person aggrieved in

(1) (1894) 18 Mad., 250.
(2) (1876) 1 Mad., 383.
(3) (1888) 11 All., 104.
(4) (1881) 5 Bom., 580.
(5) (1891) 14 Mad., 379.
(6) (1887) Cr. Rul. No. 14.

section 198, Criminal Procedure Code, was the person defamed. There is one decision in our Bombay Reports (*Queen-Empress* v. *Bai Rukshmoni*[1]) which was passed expressly on section 198, Criminal Procedure Code, in connection with a prosecution under section 494, Indian Penal Code. There the wife of a lunatic was prosecuted for bigamy on the complaint of the lunatic's brother, and it was held that this brother was not a person aggrieved within the meaning of section 198, Criminal Procedure Code.

Explanation I to section 499, Indian Penal Code, permits that the near relations of a deceased person may complain of a defamation imputing anything to a deceased person if the imputation would harm the reputation of that person if living and is intended to be hurtful to the feelings of his family or near relatives. It will appear from this that though generally the person defamed is the person aggrieved, yet, in the case of a deceased person, an exception is made which allows the relations to complain when the imputation harms the reputation of the deceased and also at the same time hurts the feelings of living persons. The word "aggrieved" is used in reference to three different complaints: 1st, in regard to complaints under Chapter XIX; 2nd, in complaints under defamation; and 3rdly, in offences against marriage —sections 493 to 496, Indian Penal Code. In cases of adultery—sections 497 and 498, Indian Penal Code—it is expressly provided by section 199, Criminal Procedure Code, that either the husband or in his absence some person who had care of the wife may complain. The person defamed is obviously not always the person aggrieved. In the case of a deceased person, the aggrieved complainant may be other than the person defamed, but the section lays down that such a living person may complain if the imputation was intended to be hurtful to the feelings of living persons besides being harmful to the deceased.

In the present case, Chhotalal does not, however, complain that his reputation has been injured. In his complaint he says it is his wife who is defamed, and his name is included as being the husband of so and so. Under these circumstances, he cannot be regarded as an aggrieved person under section 198, Criminal

(1) (1886) 10 Bom., 340.

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Procedure Code, read along with section 345, Criminal Procedure Code, which expressly enacts that the person defamed is the only person who can compound. If, as in the cases quoted above, brother and father were held not entitled to bring civil or criminal complaints, there is no ground for distinguishing the husband from other near relations. It would be a serious anomaly to hold that though the husband may complain, the wife may undo its effect by compounding under section 345, Criminal Procedure Code.

The imputation about eating and drinking was clearly personal and confined to the wife. The imputation about the wife's having intercourse with men of low caste is of a similar character. The sting there is of an offence against caste and not an offence against the law or morals. No caste meeting was held charging Chhotalal for the fault of his wife, and there is nothing to show that anything was intended as against Chhotalal by the caste.

Under these circumstances the person aggrieved under section 198, Criminal Procedure Code, was the person who was defamed and who alone could compound. I would, therefore, reply to the reference made to us by saying that the Bombay decision was correctly decided and that the decision in *Chellam Naidu* v. *Ramasami*[1] must be regarded as overruled by the decision in *Brahmanna* v. *Ramarkishna*[2]. The person aggrieved may be other than the person defamed under special circumstances, but the complaint in this case does not disclose such circumstance, and, therefore, the general law must govern.

*Order according to the decision of the Full Bench.*

(1) 1891) 14 Mad., 379. (2) (894) 18 Mad., 250.

# APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Crowe.*

GOVIND HARI DEV (ORIGINAL PLAINTIFF), APPELLANT, *v.* PARASHRAM MAHADEV JOSHI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1900. *August* 15.

*Civil Procedure Code (Act XIV of* 1882), *Sec.* 43—*Transfer of Property Act (IV of* 1882), *Sec.* 99—*Agreement to pay a debt partly in cash and to secure balance by mortgage, or, in default, to execute mortgage for whole amount—Failure to pay part in cash—Decree for such part—Second suit to enforce giving of mortgage for balance barred.*

On a settlement of account between plaintiff and defendant No. 1 it was found that Rs. 15,505 were due by the first defendant to the plaintiff, and an agreement was made between them that Rs. 4,000 of this debt was to be paid off by the first defendant before the 18th September, 1895, and that a mortgage on certain specified immoveable property was to be given for the balance; but, in the event of his failing to pay the Rs. 4,000 within the stipulated period, the mortgage was to be for the full amount. The agreement was dated 15th June, 1895, was put into writing, and was duly registered. The first defendant failed to pay the Rs. 4,000 as agreed or to execute the mortgage, and the plaintiff on the 16th September, 1899, brought a suit against him to recover the Rs. 4,000 with interest thereon, and obtained a decree on the 29th September, 1899. On the 30th September the plaintiff commenced the present suit against defendant No. 1 and against defendant No. 2, who as judgment-creditor of defendant No. 1 had attached the property specified in the agreement, praying that either the first defendant should be ordered to pass to the plaintiff a mortgage-bond for the balance due, or that a decree should be passed for the recovery of the said balance by sale of the said property and from the first defendant, and that the property be declared liable for the amount claimed.

*Held*, that the suit was barred under section 43 of the Civil Procedure Code (Act XIV of 1882).

APPEAL from the decision of Ráo Bahádur N. N. Nanavati, First Class Subordinate Judge at Thána, in Suit No. 206 of 1899.

The defendant was indebted to the plaintiff in the sum of Rs. 15,505. On the 15th June, 1895, it was agreed that the Rs. 4,000 of this sum should be paid to the plaintiff before the 18th September, 1895 and a mortgage given to him of certain specified property for the balance (Rs. 11,505) remaining due. If the defendant failed to pay the Rs. 4,000 by the above date the

* Appeal, No. 59 of 1900.

1900.

GOVIND v. PARASHRAM.

mortgage was to be for the whole amount. The agreement was put into writing and registered. It was as follows:—

"I (defendant 1) am indebted to you (plaintiff) upon a *khâta*. Upon an adjustment of the account of this *khâta* this day, Rs. 15,505 are found due to you; out of this sum, I shall pay you Rs. 4,000 before Bhadrapad Vadya 30th (18th September, 1895) of the current year. I shall pass to you a mortgage-bond for the balance that will remain due to you before Bhadrapad Vadya 30th (18th September, 1895). If I fail to pay you Rs. 4,000 as agreed above, I shall pass to you a mortgage-bond for the whole amount. At present the rate of interest in the *khâta* is one rupee, but in the document I shall state it to be ten annas (per cent. per month) * * (Description of the properties to be mortgaged) * * If I fail to pass a mortgage-bond as agreed above within the stipulated period, and if you file a suit against me for the same, I shall pay you the costs of the suit with interest. As written above I shall pay you Rs. 4,000 before Bhadrapad Shudh 15th (4th September, 1895) and I shall afterwards pass to you a mortgage-bond in respect of the above property before Bhadrapad Vadya 30th (18th September, 1895) for such balance as may be found due with interest."

The Rs. 4,000 were not paid and no mortgage was ever executed.

On the 16th September, 1899, the plaintiff sued the defendant for the Rs. 4,000, and on the 29th September, 1899, obtained a decree. On the 30th September, 1899, the plaintiff filed the present suit against the first defendant (the debtor) and against the second defendant, a creditor, who had attached the immoveable property specified in the agreement. He alleged that the original balance of Rs. 11,505 had now increased with interest to Rs. 17,442-7-9, and he prayed that either the first defendant should be ordered to pass a mortgage-bond for that amount, or that a decree should be passed for the recovery of that sum by sale of the property agreed to be mortgaged in the document of the 15th June, 1895, and from the first defendant, and that the property be declared liable for that amount.

The first defendant did not appear.

Defendant No. 2 appeared and contested the plaintiff's claim.

The Subordinate Judge held (1) that the suit was barred by section 43 of the Civil Procedure Code (Act XIV of 1882); (2) that the claim for specific performance of the agreement was barred by limitation; (3) that the agreement was fraudulent; and he dismissed the suit.

The plaintiff appealed.

*Lang* (Advocate General) with *Ramdatt V. Desai*, for the appellant (plaintiff): —There is no evidence to support the allegation of fraud against the plaintiff. The debt due to him is not denied. It is not alleged that he was aware of the dealings between his debtor (defendant No. 1) and defendant No. 2. There was nothing fraudulent, therefore, in his obtaining security for the large amount due to him.

The suit is not barred by section 43 of the Civil Procedure Code. The agreement contained two separate and distinct provisions. The first was that Rs. 4,000 were to be paid in cash on or before the 18th September, 1895, and that for the balance of about Rs. 11,505 the debtor was to pass a mortgage-bond to the plaintiff after that date. At the end of the document there is an important clause changing the date of payment of the Rs. 4,000 in cash from the 18th September to the 4th September, 1895. There were thus two distinct dates specified for the performance of the two obligations. No doubt when the suit for Rs. 4,000 was filed, the debtor had failed to meet both his obligations and the whole amount of Rs. 15,000 had then become payable. But the plaintiff did not thereby lose his right to recover the Rs. 4,000 in cash if he chose to do so, still reserving his right to obtain the remedy of a mortgage for the balance. Section 43 refers to the same cause of action. In the present instance there were two different causes of action, and the plaintiff by suing first on one is not precluded from suing afterwards on the other.

But, further, there is a distinct charge created on the property by the agreement, and a suit for the specific performance of that agreement to obtain a mortgage-deed is needless. This charge would bind not only the debtor, but also his judgment-creditor (defendant No. 2), who attached the property after that charge was created. He could only attach the interest of his judgment-debtor as it stood on the date of the attachment.

It may be contended on the other side that by the last clause of section 43 the plaintiff ought to have included both his claims in the first suit. But under section 99 of the Transfer of Property Act (IV of 1882) he has a right to sue notwithstanding the provisions of section 43 of the Civil Procedure Code.

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*Scott* with *Narayan G. Chandavarkar*, for the respondent (defendant No. 2):—We do not object to a personal decree against the first defendant. But the claim for specific performance is time-barred under article 113, Schedule II, of the Limitation Act. There was really one contract and not two. The cause of action was also one after the 18th September, 1895. The agreement provides that if default be made in payment of Rs. 4,000 in cash, a mortgage-bond should be passed for the whole amount that may be then found due, that is, including the Rs. 4,000. The first suit, therefore, split up the plaintiff's cause of action, and section 43 of the Civil Procedure Code is a bar to the present suit. Section 99 of the Transfer of Property Act and section 43 of the Code must be read together.

JENKINS, C. J.:—On a settlement of accounts it was found that there was due from the first defendant to the plaintiff Rs. 15,505, and in reference to this indebtedness the arrangement was made, which is contained in a document dated the 15th June, 1895, Exhibit 15 in the case. The leading idea of this document was, that Rs. 4,000 of this debt was to be paid off before the 18th of September, and that a mortgage on the specified property was to be given for the balance. But, in the event of the first defendant's failing to pay the Rs. 4,000 within the stipulated period, the mortgage was to be for the full amount. That, we think, is the true effect of the document, notwithstanding the argument advanced by the Advocate General in reliance on its last clause. Exhibit 15 was duly registered. The Rs. 4,000 was not paid as provided, nor has a mortgage been executed.

On the 16th September, 1899, the plaintiff commenced a suit in the Pen Second Class Subordinate Court to recover the Rs. 4,000 with Rs. 1,916 for interest thereon, but in order that the suit might come within the jurisdiction of that Court Rs. 917 were remitted. On the 29th of September, 1899, a decree was passed in the plaintiff's favour. On the 30th September, 1899, the plaintiff commenced the present suit against the first defendant, his debtor, and against the second defendant, who as a judgment-creditor of the first defendant has attached the property comprised in the mortgage. In it the plaintiff prays that either defendant No. 1 be ordered to pass to the plaintiff a mortgage-bond for

Rs. 17,442-7-9, or that a decree be passed for the recovery of the said amount by sale of the property agreed to be mortgaged and from defendant No. 1, and that the property be declared liable for the amount claimed.

The case was heard by the First Class Subordinate Judge of Thána, who held (1) that the suit was barred by section 43 of the Civil Procedure Code, (2) that the claim for specific performance is barred, and (3) that the agreement was fraudulent, and as a consequence he dismissed the suit. From this decree of dismissal the present appeal is preferred by the plaintiff, who has maintained that on each of these points the lower Court erred.

Mr. Scott has not attempted on behalf of the second defendant to support the finding of fraud, nor do we think there is anything on the record to justify the Judge's conclusion on this point. To this extent, therefore, we think he is wrong. This brings us to the points which have been argued before us.

Section 43 of the Code of Civil Procedure is in these terms:—

"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

"If a plaintiff omit to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

"A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but, if he omits (except with the leave of the Court obtained before the first hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted.

"For the purpose of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action."

The contention founded on this section is, that the Rs. 4,000 sued for in the Pen Court was but a part of the Rs. 15,505 and interest, and inasmuch as the plaintiff omitted to sue then for the balance, he cannot now sue in respect of it. To escape from this the argument advanced by the Advocate General is, that the present is a different cause of action: in the former suit the plaintiff sued for non-payment of the Rs. 4,000, while in this suit

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he sues for damages for breach of the agreement to execute a mortgage. We think this argument cannot prevail: as a matter of fact the Rs. 4,000 and the Rs. 15,505 were portions of one total indebtedness, and though there was the agreement for payment of the Rs. 4,000, to which we have already alluded, when the Pen suit was commenced, the whole amount was equally payable and in respect of every part of that amount the first defendant had failed to perform his obligation to execute the mortgage. In whichever way, therefore, the position be regarded, there was one cause of action; and, so far as the argument to which we have referred goes, it appears to us that section 43 affords a conclusive answer.

There is, however, another way of approaching the case that presents a certain amount of difficulty, and with this we will now deal.

Did the plaintiff by virtue of the agreement actually obtain a charge on the property for the whole amount of the debt, and if so, is he in a better position so far as the plea of *res judicata* goes? Now it is clear that so far as the plaintiff requires a decree for specific performance in his favour, he is out of Court; because article 113 in the Schedule to the Limitation Act would apply. But in our opinion he is under no obligation to seek specific performance; the existing indebtedness constituted a valuable consideration, and it follows that even without the execution of the contemplated mortgage a good charge was created in the plaintiff's favour, which would prevail, not only against the first defendant, but also against the second defendant, who as a judgment-creditor could not have a greater interest than his debtor. But does this better the plaintiff's position? The last clause in section 43 of the Code of Civil Procedure provides that for the purposes of the section an obligation and a collateral security shall be deemed to constitute but one cause of action: so that, if matters rested there, the plaintiff by suing for the Rs. 4,000 would have precluded himself from suing on his collateral security. We have stated this position hypothetically, because the Advocate General maintains that, so far as mortgage securities go, this provision is nullified by section 99 of the Transfer of Property Act. Now that section is as follows:—

"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67, and he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, section 43."

When the Transfer of Property Act was passed, the Civil Procedure Code then in existence was not the present Code, Act XIV of 1882; but by section 3 of the present Code it is provided that "when in any Act * * * passed * * * prior to the day on which this Code comes into force reference is made to * * * the Code of Civil Procedure * * * such reference shall, so far as may be practicable, be read as applying to this Code or the corresponding part thereof." Conceding, then, that section 43 of the Civil Procedure Code must be read in subordination to section 99 of the Transfer of Property Act, what is the result? If we accept the Advocate-General's argument, we have to exclude mortgages from the operation of the last clause of section 43, though they would certainly seem to be the collateral securities directly aimed at: we should, in effect, be imputing to the Legislature the error of repugnancy. It is, therefore, necessary to see whether the two sections are not reasonably capable of a construction which will avoid that result.

Now it is clear that section 43 is directed against two evils: the splitting of claims and the splitting of remedies. If a man omits from his suit a portion of his claim, he shall not afterwards sue in respect of it: if he omits one of his remedies, he cannot afterwards pursue it, so that if a mortgagee sues on his personal security alone he cannot afterwards sue on his real security. That we take to be the effect of section 43 standing by itself.

Section 99 of the Transfer of Property Act is aimed at another and distinct evil: the hardship inflicted on mortgagors by mortgagees proceeding to realize their claim by execution of money decrees passed in respect of the mortgagor's personal liability. Consequently, that section provides, that mortgaged property shall not be sold in execution of a decree otherwise than by an ordinary mortgagee's suit. It will be seen, therefore, that the primary purpose of section 99 is not to increase, but to curtail a mortgagee's powers; and to secure that end, and for that purpose

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alone, the bar imposed by section 43 of the Code of Civil Procedure has to be relaxed.

Then comes the question how far does this relaxation extend? Does it nullify the whole of that section, and remove the restriction both on the splitting of claims and the splitting of remedies? We think not; its only purpose is, in our opinion, to relieve a mortgagee from the restriction placed on the splitting of his remedies. The rest of the restriction is unimpaired, and inasmuch as the plaintiff in this case has omitted in his former suit to sue in respect of the Rs. 11,505, which was a portion of his claim, he cannot now sue in respect of the portion omitted.

For these reasons we think that section 43 of the Code of Civil Procedure is a bar: the decree of the lower Court must be confirmed and this appeal dismissed with costs.

*Decree confirmed.*

## APPELLATE CRIMINAL.

*Before Mr. Justice Fulton and Mr. Justice Batty.*

1900.

*August* 20.

QUEEN-EMPRESS *v.* BASVANTA AND OTHERS.*

*Evidence—Confession—Retracted confession—Evidence Act (I of* 1872), *Secs.* 24, 30 *and* 33—*Deposition of a deceased witness—Admissibility of such deposition in subsequent proceedings.*

A confession duly recorded and certified under section 164 of the Criminal Procedure Code (Act V of 1898) is admissible in evidence against the person making it unless shut out by the provisions of section 24 of the Indian Evidence Act (I of 1872).

A mere subsequent retractation of a confession which is duly recorded and certified by a Magistrate is not enough in all cases to make it appear to have been unlawfully induced.

The law in India is not identical with the law in England on the relevancy and admissibility of confessions.

*Imperatrix* v. *Balya Dagdu*(1) dissented from.

*Reg.* v. *Balvant*(2) followed.

Where a witness for the prosecution was examined before a committing Magistrate, but was not cross-examined, and then died before the case came

* Ciminal Appeals, Nos. 350 to 352 of 1900.

(1) Cr. Rul. No. 3 of 1898. (2) (1874) 11 Bom. H. C. R., 137.

on for trial to the Sessions Court, and his deposition was tendered in evidence at the trial,

*Held*, that the deposition was admissible under section 33 of the Evidence Act (I of 1872).

APPEALS from the convictions and sentences passed by F. C. O. Beaman, Sessions Judge of Belgaum, in the case of *Queen-Empress* v. *Basvanta* and four others.

The five accused were committed to the Sessions Court of Belgaum on a charge of murder under section 302 of the Indian Penal Code (Act XLV of 1860).

Accused Nos. 1 and 2 made confessions before the First Class Magistrate of Belgaum implicating themselves and the other accused in the crime.

These confessions were subsequently retracted by the accused during the course of the preliminary inquiry before the committing Magistrate on the ground that they had been extorted by torture.

The Sessions Judge refused to admit these confessions in evidence, as he considered that the circumstances were such as to throw a serious doubt on their voluntariness.

On the rest of the evidence for the prosecution the Sessions Judge concurring with the jury convicted all the accused of the offence charged, and sentenced them each to death subject to the confirmation of the sentence by the High Court.

Thereupon the accused appealed to the High Court.

Rao Bahádur *V. T. J. Kirtikar*, Government Pleader, for the Crown.

*Nilkhant Atmaram* for accused Nos. 1, 2 and 3.

*B. A. Bhagwat* for accused Nos. 4 and 5.

FULTON, J.:—In this case the Sessions Judge of Belgaum has, on the unanimous verdict of a jury, convicted the five accused persons of the murder of one Satyagowda and has sentenced them to death. Against these convictions the prisoners have all appealed, and the case now comes before us, both on appeal and on the reference of the Sessions Judge, for confirmation of the sentences.

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The murder is proved to have been committed about 10 or 11 A.M. on the 14th April in the open street in the village of Nidsoshi, and there seems no reason to doubt that two persons —Anantbhat and Gopal—were actually present at the scene.

The third accused was arrested within a very short time of the murder at a well on the Akivat road, where he was washing his clothes. The fourth and fifth accused were arrested about 10 P.M. the next day in a hut about a quarter or half a mile from the village of Nidsoshi. The first and second accused were arrested at Belgaum on the 22nd April—eight days after the murder.

The evidence to support the conviction has been carefully analysed by the Judge in his charge to the jury, and his classification may conveniently be adopted. (His Lordship then discussed the evidence in detail and continued as follows :—)

It was suggested that the deposition of witness No. 25, who died before the trial, was inadmissible, as he was not cross-examined before the Magistrate. But, we think that, as the accused persons had the right and opportunity of cross-examining him, his evidence was admissible under section 33 of the Evidence Act, notwithstanding the omission of their pleader to avail himself of that right.

So far the case as presented to the jury was simple. Their verdict was amply supported by the evidence before them. But in addition to that evidence there are the confessions made by accused Nos. 1 and 2 on the 30th April, which, it is contended, introduce an element of uncertainty.

The learned Sessions Judge refused to admit these confessions, as he considered that the circumstances were such as to throw a serious doubt on their voluntariness. The Government Pleader on the one side and Mr. Bhagwat on the other on behalf of accused No. 5 have both applied to us for their admission.

For two reasons we think that the Judge was in error in rejecting them.

In the first place, even if inadmissible against accused Nos. 1 and 2, who made them, they ought to have been admitted in favour of No. 5 on the principle explained in the case of *Pitamber*

*Jina*[1]. The Judge himself, when he came to pass sentence, felt the difficulty of the situation. He then very properly referred to these confessions, for it would have been wrong to pass sentence of death on No. 5 without reference to them. Similar considerations might have suggested the necessity of laying them before the jury; but we notice with some surprise that the pleader for No. 5 does not appear to have pressed for their admission. Perhaps it may have been thought that they would not influence the verdict; but they were obviously material to the case and required to be taken into account.

In the second place we think that even as against accused Nos. 1 and 2 there was no sufficient reason for their exclusion.

We are of opinion that in India a confession duly recorded and certified under section 164, Criminal Procedure Code, is admissible in evidence against the person making it, unless shut out by the provisions of section 24 of the Evidence Act, "to which alone", as pointed out in *Pitamber's* case[1] by Chief Justice Westropp, "we are at liberty to look for the law of evidence in this country."

We have read with sympathetic interest the discussion on this subject which has lately appeared in the July Number of the *Bombay Law Reporter* and appreciate the manifest earnestness of the writer in his desire to prevent the extortion of confessions by unfair means. But, in deciding whether or not any particular confession is admissible in evidence, we have to be guided by the provisions of the law enacted by the Legislature. It is true that in England when a doubt arises as to the admissibility of a confession, the Court has to decide whether it has been proved affirmatively to be free and voluntary. This is the law laid down in the *Queen* v. *Thompson*[2] by Mr. Justice Cave with the concurrence of Lord Coleridge, C. J., and Hawkins, Day, and Wills JJ.

In India the law on the subject is contained in section 24 of the Evidence Act, as follows:—

"A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused

(1) (1877) 2 Bom., 61. (2) (1893) 2 Q. B., 12.

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by any inducement, threat, or promise having reference to the charge against the accused person proceeding from a person in authority and sufficient in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

The section must be fairly construed according to its language, and if this is done it seems to us impossible to contend that the law in India is identical with the law in England as explained in *The Queen* v. *Thompson* and the cases therein referred to. The question which a Court has to decide when determining on the admissibility of a confession is whether it appears to the Court to have been induced by the means mentioned in that section. It may be that this section does not require positive proof, within the meaning of section 3, of improper inducement to justify the rejection of the confession. The use of the word "appears" indicates, it may be argued, a lesser degree of probability than would be necessary if "proof" had been required. A Court might perhaps in a particular case fairly hesitate to say that it was *proved* that the confession had been unlawfully obtained, and yet might be in a position to say that such *appeared* to it to have been the case. Still although we think that very probably a confession may be rejected on well-grounded conjecture, there must be something before the Court on which such conjecture can rest. It does not seem possible to say that the mere subsequent retractation of a confession which has been duly recorded and certified by a Magistrate, is enough in all cases to make it appear to have been unlawfully induced. Without assuming the functions of the Legislature we cannot lay down any general rule to meet the varying circumstances of different cases. To require, as the criterion of admissibility, affirmative proof that a duly recorded and certified confession was free and voluntary, would not, in our opinion, be consistent with the terms of sections 21 and 24 of the Evidence Act, or with the interpretation given to those sections by Mr. Justice Nanabhai in *Reg.* v. *Balvant*[1] which appears to us to have been correctly decided and to be in harmony with the practice of the Courts.

(1) (1874) 11 Bom. H. C. R., 137.

The remarks made in *Imperatrix* v. *Balya Dagdu*[1], in so far as they may have been intended to prescribe a different practice, cannot, we think, be accepted as consistent with section 24, nor do they appear to have been necessary for the decision of the case in which the disputed confession was accepted and acted on.

It may be thought that the law as it stands does not afford adequate protection to prisoners against illegal practices whereby confessions are extorted, but it is not permissible to us to amend it. What the Legislature doubtless hoped and intended was that Magistrates would not record confessions unless they really believed that they were made voluntarily (Cf. *Queen* v. *Thompson* [2]). In the case of Magistrates acting under section 164 of the Criminal Procedure Code, there can be no question that they must be affirmatively satisfied of the voluntariness of the confession, and that when in doubt on this point they ought not to record or give the certificate. The consideration which this question is at present receiving will, we hope, lead to the issue of such instructions as may help Magistrates in the difficult task of deciding what confessions are "voluntary," but the matter is not one that can be further discussed in this judgment, in which we are confined to the points immediately at issue.

In the present case we can see no reason for supposing that the confessions were not voluntarily made. The accused were arrested on the 22nd and were sent to the Magistrate on the 29th April. Their statements were recorded on the 30th, at which time their bodies were examined, and no marks of ill-treatment were discovered. Subsequently in the committal proceedings they retracted their confessions and said according to the English translation that they had been tortured. According to the vernacular, which doubtless contains the words actually used, No. 1 said he had suffered *ras* (trouble—annoyance), and No. 2 said he had been beaten (*badadu-hodadu*). The Magistrate, when these statements were made to him on the 30th May, ought, we think, to have questioned the accused further on the subject so as to ascertain exactly what they had to allege. The remarks of Chief Justice Westropp in *Reg.* v. *Kashinath Dinkar*[3] show

(1) Cr. Rul. 3 of 1898. (2) (1893) 2 Q. B., 12.

(3) (1871) 8 Bom. H. C., 126, at pp. 137, 138.

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that allegations of ill-treatment made by prisoners are not to be overlooked. These remarks, we fear, are as appropriate at the present day as they were when they were written in 1871. But it may be that, as the Magistrate who committed the case was the same as the Magistrate who a month before had recorded the confessions and had examined the bodies of the accused, he was satisfied that the allegations of physical ill-treatment were untrue, and, therefore, refrained from further enquiry on the subject. There is nothing, then, to show that as a matter of fact these two accused had been ill-treated, for we do not think that their general statement on the subject on the 30th May outweighed the fact that no marks appeared on their bodies on the 30th April. The beating alleged by No. 2 could hardly have escaped detection, and no other form of torture was suggested. The fact that the accused were eight days in the custody of the police, might suggest unwillingness to confess at an earlier period, but in the Sessions Court the policeman (witness No. 27) who sent them to the Magistrate, was not questioned as to his reasons for the delay. Looking to the terms of the confessions themselves there is nothing special to indicate coercion. Those terms can hardly have been dictated by the police, omitting, as they do, the name of No. 5. They contain full admissions of guilt, but they are slightly favourable to the men who made them, inasmuch as they are represented as instruments of others, rather than the originators of the plot. It may be matter for wonder why they should have confessed at all, but it is possible that they realized the hopelessness of their position, having committed the murder in the presence of witnesses and then fled from the village. In these circumstances they may have thought it useless to deny their guilt and may have supposed that confession was their best course. In many cases circumstances may suggest grounds for believing that confessions have been made under pressure, but such circumstances seem to us wanting in the present case. The Magistrate who recorded the confessions has certified that he believes them to have been voluntarily made, and there is nothing to make it appear to us that they were obtained by means which would render them inadmissible under section 24.

We, therefore, decide to admit them under the provisions of section 375 of the Criminal Procedure Code. Without them

the evidence is amply sufficient for the conviction of accused Nos. 1, 2, 3 and 4; and the fact of these confessions having been made only serves to assure us of the correctness of the conclusion at which the jury have arrived, and to which we should ourselves have come on the evidence recorded by the Judge.

As regards No. 5, the confessions present difficulties which would otherwise have been wanting, but in spite of them we are of opinion that the conviction is right. It is difficult to disbelieve the evidence of the two eye-witnesses who are as positive about No. 5 as about the other prisoners.

(His Lordship, after dwelling upon the evidence presented against accused No. 5, proceeded as follows:—)

It seems impossible to suppose that all this evidence could thus hastily have been concocted against No. 5, merely on suspicion based on the old feud, or to doubt the truth of what the witnesses depose to. How, then, can the omission of the name of No. 5 in the confessions be accounted for? We think that it can only be explained on the hypothesis that for some reason or other Nos. 1 and 2, who probably knew nothing of his report, wished to screen him. They knew the facts, and possibly believed that he was not such an active instigator as Nos. 3 and 4. He seems to have taken a less prominent part in the murder itself and may have been half-hearted, but that he was concerned both in the plot and in the crime itself we think there can be no doubt.

The murder was cruel and deliberate. All who took part in it might justly be condemned to die. But as usual in cases where many prisoners are involved, we hesitate to confirm so many sentences and try to discriminate. For Nos. 3 and 4 there seems nothing to be said. Their sentences must be confirmed. Nos. 1 and 2 are younger men who seem to have been acting under the direction of others: No. 5, though meanspirited in his conduct, seems to have been less resolute about the murder than the rest. We shall commute the sentences in the case of these three prisoners. We dismiss the appeals of Nos. 3 and 4 and confirm the sentences of death. In the case of the other three prisoners we commute the sentences to transportation for life.

# ORIGINAL CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Tyabji.*

1900.
*December 7.*

FERNANDEZ (ORIGINAL PLAINTIFF) APPELLANT, *v.* WRAY (ORIGINAL DEFENDANT), RESPONDENT.

*Jurisdiction—Letters Patent, 1865, Cl. 12—Dwell—Temporary residence when sufficient to give jurisdiction.*

The defendant, who was Political Agent at Kolhápur, left Kolhápur on the 6th March, 1900, *en route* for England on a year's furlough. He arrived in Bombay on the 7th March and sailed for England on the 10th. While the defendant was in Bombay (*viz.* on the 8th March) the plaintiff presented a plaint against him, in the heading of which he (defendant) was stated to be then residing at Malabár Hill in Bombay. The plaint in the first instance was rejected for want of jurisdiction. On appeal,

*Held*, that the temporary residence of the defendant in Bombay under the circumstances gave the Court jurisdiction, and that the plaint should be admitted.

For the purposes of jurisdiction a man may be said *primâ facie* to dwell where he is staying at any particular time, but it is open to him to show that he is not dwelling there, but at some other place. The defendant had no residence at Kolhápur at the time the plaint was presented, and must be taken to have then been dwelling in Bombay.

APPEAL from an order made by Russell, J., rejecting the plaint on the ground that the Court had no jurisdiction.

Suit for damages for false imprisonment and malicious prosecution.

The defendant was the Political Agent at Kolhápur, and the plaintiff resided there. On the 6th March, 1900, the defendant left Kolhápur *en route* for England on a year's furlough, having handed over charge to the officer appointed to act for him. He arrived in Bombay on the morning of the 7th March and sailed for England on the 10th. On the 8th March, while he (the defendant) was still in Bombay, the plaintiff presented the plaint to Russell, J., who rejected it for want of jurisdiction. An appeal was filed the same day and notice of the appeal was served on the defendant on the following day (the 9th March).

In the heading of the plaint the defendant was stated to be then residing at Malabár Hill in Bombay.

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FERNANDEZ v. WRAY.

The question on appeal was whether the temporary residence of the defendant in Bombay was sufficient to give the Court jurisdiction.

*Scott* for plaintiff.

*Lang* (Advocate General) for defendant.

They cited *Morris* v. *Baumgarten*(1); *Everet* v. *Frere*(2); *Alexander* v. *Jones*(3); *Ex parte Pascal: In re Myre*(4); *Ramchandra* v. *Keshav*(5); *Gosvami* v. *Shri Govardhanlalji*(6); *Kavasji* v. *Wallace*(7).

JENKINS, C. J.:—The plaintiff in this case sues to recover Rs. 10,000 as damages for the wrongful acts of the defendant. The plaint was presented to Russell, J., on the 8th March, 1900, but he rejected it on the ground that he was not satisfied that the defendant was residing at Malabár Hill within the jurisdiction of this Court. What caused the doubt in the mind of the learned Judge I do not know, for although there is no allegation in the body of the plaint that Colonel Wray was then residing at Malabár Hill, yet this statement was made in the description of the defendant contained in the heading of the plaint; and although I think it is desirable that in cases of this kind there should be a general statement of the fact in the plaint, yet it has always been the practice to accept, in the first instance, the statement made in the heading.

The question for our decision is whether, at the time of the commencement of the suit, the defendant was dwelling within the jurisdiction. The facts are very simple. The defendant was Political Agent at Kolhápur, and he resided there up to the evening of the 6th March. Having obtained a year's furlough he left Kolhápur on that evening and arrived in Bombay on the next day, *viz.*, the 7th March. This plaint was lodged on the 8th March. The defendant was then in Bombay and he remained here until the 10th, on which day he sailed for England.

Was the defendant's remaining in Bombay for this period of four days sufficient to satisfy clause 12 and to give this Court jurisdiction? Ordinarily, no doubt, it would not be said that

(1) (1865) Coryton, 152.
(2) (1885) 8 Mad., 205.
(3) (1866) L. R., 1 Ex., 133.
(4) (1876) 1 Ch. D., 509.
(5) (1881) 6 Bom., 100.
(6) (1890) 14 Bom., 541 at p. 550.
(7) (1863) 1 Bom. H. C. R., 113 (o. c.)

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a man remaining here for so short a time was "dwelling" here, but that is because he would ordinarily have a permanent dwelling or residence elsewhere. The cases show that *primâ facie* a man may be said to dwell, where he is staying at any particular time, but it is open to him to show that he is not dwelling there, but at some other place. [His Lordship then dealt with the evidence and continued:]

I am of opinion, on the evidence, that the defendant had no residence at Kolhápur at the time this plaint was lodged, and that he must be taken to have been then dwelling in Bombay within the meaning of the provisions of clause 12 of the Letters Patent, and that, therefore, this plaint must be accepted.

TYABJI, J.:—I am of the same opinion. I think that the words "reside" and "dwell" have a narrow or more extended meaning according to the intention of the Legislature in the various Acts in which they occur. For the purpose of jurisdiction I think the authorities establish that, if a person has no permanent residence, he may be said to dwell wherever he may be found. Now had Colonel Wray any permanent residence when this plaint was presented? The only residence that has been suggested is Kolhápur. But he gave over charge of his appointment there and left the place on the 6th March. The house in which he had lived there was not his own. It was a house belonging to Government and is occupied by the Political Agent for the time being, and the officer appointed to act for Colonel Wray took up his residence there. Colonel Wray had sold off his furniture and other effects at Kolhápur, so that it would appear that he did not intend to return. At all events there is nothing to show that he did intend to return. I think, therefore, that he ceased to dwell at Kolhápur on the 6th March, and that when this plaint was presented he had not acquired any other residence, and must, therefore, be taken to have been then dwelling in Bombay, and that this Court has jurisdiction under clause 12 of the Letters Patent.

*Appeal allowed.*

Attorneys for plaintiff:—Messrs. *Thakurdas, Dharamsi, Cama, & Co.*

Attorney for defendant:—*The Government Solicitor.*

# CRIMINAL REVISION.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.*

*IN RE* PANDURANG GOVIND PUJARI AND OTHERS.*

1900. *August* 23.

*Criminal Procedure Code (Act V of 1898), Secs. 145 and 526—Transfer of a case—Criminal case—Bias of Judge—Magistrate's powers under Sec. 145—Breach of peace—Rights of the parties.*

The provisions of section 526 of the Criminal Procedure Code (Act V of 1898) do not give any power to direct the transfer of any proceedings initiated under section 145 of the Code. Such proceedings do not constitute a "criminal case" within the meaning of section 526 of the Code. A criminal case means a case arising out of, and dealing with, some crime already committed. It does not include proceedings taken for the prevention of crime.

Under section 145 of the Code a Magistrate is not at liberty to go into the merits of the claims of any of the parties to the dispute, to a *right* to possess the subject thereof. He can decide only the fact of possession at the date of the order requiring the parties to put in their statements.

The parties cannot be called upon to furnish a statement of their rights, nor can the Magistrate take, as the basis of any action he may finally decide upon, any conclusion at which he may arrive, or at which he may have arrived, as to the respective titles of the parties.

THIS was an application under section 526 of the Criminal Procedure Code (Act V of 1898) for the transfer of a case from the Court of the First Class Magistrate at Pandharpur.

The applicants were the *Sevadharis* (temple servants) of the temple of Shri Pandurang at Pandharpur(1). The *Badves*, who opposed the application, were the chief priests, managers, and trustees of the said temple.

A dispute arose between the *Badves* on the one hand and the *Sevadharis* on the other, about the right of performing the *Alankar Puja* (decoration rites) at the temple.

Thereupon one Dnyneshwar Dadaji Badve made a complaint to the District Magistrate of Sholápur, complaining that the *Benares*, a class of *Sevadharis*, had obstructed him in the performance of the said *puja*.

On this complaint the District Magistrate passed an *ex parte* order on the 10th of October, 1899, to the following effect:—

* Criminal Application for Revision, No. 144 of 1900.

(1) See I. L. R. 24 Bom., 527.

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"There appears to be a dispute about the *Alankar Puja*. But looking to the past practice, the *Badves* alone have the right to perform the service, and the High Court of Bombay has also decided that *Badves* alone should perform this *puja*. The *Benares* and the other *Sevadharis* have no right at all to perform this service. For this reason, if the *Sevadharis* or other persons obstruct the *Badves* at the time of this service, the police should remove the obstruction, and, if necessary, those who cause the obstruction should be expelled from the temple during this service."

This order was set aside by the High Court on the 22nd January, 1900, on the ground of defect in procedure, and the District Magistrate was directed to re-hear the case after giving due notice to all persons interested in the matter.

After the remand the District Magistrate transferred the case for inquiry to the First Class Magistrate at Pandharpur.

On the 12th May, 1900, the Magistrate purporting to act under section 145 of the Criminal Procedure Code (Act V of 1898) issued an order to the *Badves* as well as to all classes of *Sevadharis* requiring them to file written statements of their respective rights and duties at the performance of the *Alankar Puja*.

Thereupon the present application was made to the High Court by the *Sevadharis* for the transfer of the case from the Court of the First Class Magistrate to another Court, on the following grounds, viz. :—

"(1) That the First Class Magistrate at Pandharpur being a *yejmán* or patron of one of the *Badves*, there was a likelihood of his dealing with the case with a real bias in their favour.

"(2) That the Magistrate had already expressed his opinion in favour of the *Badves* and against the *Sevadharis* about their respective rights and duties at the temple, especially in connection with the *Alankar Puja*, in a report submitted by him to the District Magistrate of Sholápur on 5th May, 1893.

"(3) That the Magistrate having thus prejudged the merits of the case was disqualified from trying the case."

Upon this application the High Court issued notices to the District Magistrate and the *Badves* to show cause why the case should not be transferred.

Thereupon the District Magistrate made the following affidavit :—

"It is a fact that Mr. Thakar is the *yejman* of Vishwanath Gopal Badve, but the word 'patron' is not a quite correct translation of the term '*yejman*.' It is customary for every Hindu to have some '*upadhya*' or priest at sacred places like Pandharpur; this relation of '*yejman*' and priest has descended to Mr. Thakar and Vishwanath Badve from their forefathers as a mere matter of form. I am sure it can in no way affect the judicial impartiality of the former.

"It is also true that Mr. Thakar once submitted a report to the District Deputy Collector, Sholápur, regarding the *Alankar Puja* while Mámlatdár at Pandharpur; but that report simply expressed his general views and has nothing to do with the trial of the case or consideration of its judicial merits. It was merely a departmental report submitted in a non-judicial capacity. Besides, in the present case, this report has been already rejected as evidence. I, therefore, declare that neither of these facts will influence the Magistrate in a judicial inquiry or interfere with his judicial independence."

*G. S. Rao* for applicants.

*N. G. Chandavarkar* for opponents.

Ráo Bahádur *V. J. Kirtikar*, Government Pleader, for the Crown.

The following judgment was delivered by

JENKINS, C. J.:—A dispute having arisen at Pandharpur between the *Badves* and *Sevadharis* of a temple, with reference to the right of the *Sevadharis* (or temple servants) to participate in the *Alankar Puja* (or decoration rites), the Magistrate of the district, apparently with a view to prevent a possible breach of the peace, referred petitions received by him on the subject to a First Class Magistrate and on receiving his report issued an order purporting to affect the *Sevadharis* generally. That order owing to the defective procedure followed, and other grounds of objection, appearing to be open to revision as *ultra vires* of the powers conferred by Chapter XII of the Code of Criminal Procedure, was considered in Application No. 247 of 1899 and ultimately set aside by a Division Bench of this Court (*In re Pandurang Govind* [1], Mr. Justice Ranade and Mr. Justice Crowe) which directed the District Magistrate to "rehear the case after making all the persons interested parties, and receiving the evidence they may produce before him, and to pass a fresh order." It appears that

(1) (1900) 24 Bom., 527.

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*In re* PANDURANG GOVIND.

after the return of the records and proceedings, further action was taken by the First Class Magistrate, who issued to the parties concerned in the alleged dispute an order, which purports to be under sub-section 1 of section 145 of the Code, requiring them to attend in person or by pleader, or to put forward statements of the rights which they respectively claim. The present application has now been made to this Court to transfer the matter from the Court of the First Class Magistrate who made that order, to some other competent Court.

The impartiality of the Magistrate in question has been impugned both on the ground that he has already inquired into and reported (unfavourably it would seem to the present applicants) on the subject of the dispute, and also that he is the hereditary *yejman* of one of the parties concerned in the dispute as an *upadhya* or priest of the shrine. Among the papers now before this Court is a document which purports to be an affidavit by the Magistrate of the District, and which (*inter alia*) sets forth the opinion of that officer to the effect that the Magistrate whose impartiality is impugned, will not be influenced by the relations in which he admittedly stands to one of the parties interested. It is somewhat difficult to understand on what grounds it could have been supposed that such an expression of opinion could have formed a basis for any decision by this Court as to the advisability of directing the transfer applied for. And it is by no means reassuring to find that the head of the Magistracy of the district, in a document of so solemn a nature as an affidavit under the sanction of an oath, should have felt no hesitation in making a statement which is not one as to facts, but as to his personal opinion, which in the circumstances can only rest upon conjecture as to the mental attitude of another officer. In considering the expediency of directing a transfer for the ends of justice, the Calcutta High Court (*Dupeyron* v. *Driver*[1]) has deemed it essential to decide "not merely the question whether there has been any real bias in the mind of a Magistrate, but also the further question whether incidents may not have happened which though they may be susceptible of explanation are nevertheless such as are calculated to create in the mind of

(1) (1896) 23 Cal., 495.

the accused a reasonable apprehension that he may not have a fair and impartial trial." This ruling has been followed in *Legal Remembrancer* v. *Bhairab Chandra Chuckerbutty*[1], where it was observed that the importance of securing the confidence of parties in the fairness of the tribunal is next only to the importance of securing a fair and impartial tribunal (p. 733). A similar view was expressed by the Allahabad High Court—*Farzand Ali* v. *Hanuman Prasad*[2]. The District Magistrate on perusing those rulings will no doubt perceive that the impressions produced in his own mind as to the impartiality of the Magistrate, require less consideration than the effect likely to be produced in the minds of the *parties and their witnesses*, by the selection of a Magistrate whose personal antecedents or circumstances have however unavoidably connected him with either the one party or the other. Such considerations could not altogether have been overlooked had it been necessary for this Court to determine whether transfer should in this case be directed.

Having regard, however, to the wording of section 526 of the Code we have come to the conclusion that the provisions of that section confer no power to direct the transfer of any proceedings initiated under section 145 of that Code.

The orders that may be passed under sub-section (1) of section 526 are specified in sub-clauses (i) to (iv) of that sub-section. The first of these clauses authorizes an order that any offence be *inquired into* or *tried* by any Court competent in all respects but that of local jurisdiction. Section 145, however, does not contemplate inquiry or trial into an offence. It deals, as the heading to Part IV in which it is contained suggests, with the prevention of offences, which, if the procedure be effectual, may never be committed, and which if committed could not be inquired into or tried under the procedure prescribed in section 145.

Clause (ii) of section 526 authorizes an order that any criminal case or appeal or class thereof be transferred. The word "criminal" governs the word "appeal" as well as the word "case", and must, therefore, bear the same connotation in both connections—that is to say, a criminal case like a criminal appeal must arise

(1) (1897) 25 Cal., 727. (2) (1896) 19 All., 64.

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out of and deal with some crime already committed. It seems, therefore, that this clause confers no power to deal with procedure that can be taken only for the prevention of crime. Indeed the phrase "criminal case" recurs in clause (iii) of section 526 where it is manifestly incapable of application to any proceedings which could not be transferred to, and tried before, this Court. Clause (iv) of section 526, it is equally obvious, has no reference to proceedings under section 145. The remaining sub-sections indicate with sufficient clearness that the power to transfer operates only when there is a person accused.

Section 145, it is true, contemplates a procedure which may involve such inquiry as would fall within the definition in clause (*k*) or (*m*) of section 4 of the Code. But the action which may ultimately be taken thereunder, is not punitive, but preventive, and for that purpose, as sub-section (6) shows, is provisional only until such time as final or formal adjudication on the rights affected may be obtained and carried into effect by a Court competent to deal with the matter in due course of law. The Magistrate in acting under that section is restricted by the necessity of observing all the conditions thereby imposed as precedent to the exercise of the powers conferred. Sub-section 4 expressly provides that he is not at liberty to go into the merits of the claims of any of the parties to the dispute, to a *right* to possess the subject thereof. He can decide only the *fact* of possession at date of the order requiring them to put in their statements. And, further, this sub-section implies that it is unnecessary for him to formulate a decision even on that point if it should present insuperable difficulties. He is to decide the fact of possession "if possible", but alternative action when decision on that fact is not possible is authorized by the second proviso, which enables the Magistrate to attach the subject-matter of the dispute. It is thus evident that nothing that could affect the past, present or future *rights* of the parties, was contemplated in the section. The action to be taken (though judicial inquiry and judicial discretion are no doubt required as essential to the exercise of the powers conferred) is *quasi* executive action, having for its object and justification the prevention of a breach of the public peace. The existence of a dispute likely to cause a breach of the

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peace is a condition lying at the root of the powers conferred. It is expressly stated in sub-section (1) as a matter on which a Magistrate *must* be satisfied before he can take any action *at all* under the section, and sub-section (5) imperatively requires that the Magistrate shall, even after he has passed his order, cancel it on its being shown that no such dispute exists or has existed.

Looking to the facts of this case, and especially to the circumstance that proceedings appear to have been protracted therein from a date earlier than the commencement of the current year without apparently any ground arising for apprehension of violence of any kind on either side, we deem it desirable that the Magistrate who is to deal with this case, should have his attention specially directed to the foregoing remarks in order that he may satisfy himself of the fact that there is such likelihood of a breach of the public peace as would be necessary to justify him in taking any action whatsoever under the section. We also deem it necessary to emphasize the necessity of limiting the enquiry, which must precede his final action, to the issues with which alone the section empowered a Magistrate to deal, that is to say to the actual fact of possession, as distinct from any question of rights. The rights of the parties can only be inquired into by Courts legally competent to give a definitive judgment thereon.

Our attention has been drawn to the wording of the order made by the First Class Magistrate, ostensibly under sub-section (1) of section 145. We understand that it requires the parties concerned in the dispute to put in statements as to their respective rights. That order is not now before us on revision. We will, therefore, confine our remarks on it to the observation that the parties cannot be called on in these proceedings to furnish a statement of their rights, nor can the Magistrate take, as the basis of any action he may finally decide upon, any conclusion at which he may arrive, or at which he may have arrived, as to the respective titles of the parties. He is justified only, by the terms of the section, in taking measures to prevent a breach of the peace, if satisfied that otherwise a breach of the peace is likely to be caused by the dispute. Whether he is so satisfied, and what are the measures authorized by the section which are most appropriate in the circumstance, are matters for his

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own judicial conscience. His duty as a Magistrate is to prevent a disturbance of the peace, and provided he acts within the powers given him by law, there is nothing in the Code which would justify any of the parties in attempting to hamper the beneficent exercise of his discretion. Proceedings under section 145 of the Code are by section 435 expressly excluded from the class of proceedings liable to be dealt with on revision. And in all the cases in which the High Courts have interfered with proceedings purporting to have been taken under Chapter XII, that interference has been justified by the fact that the orders revised were not really orders under that chapter at all, but would have required, to validate them, powers which the Legislature has not seen fit to confer on any one. The powers which are conferred by Chapter XII appear, however, to be such that in order to attain their object, the prevention of disturbances and other offences affecting the public, they must necessarily be exercised with promptitude, and it would paralyse the Magistracy in the preventive action contemplated in Chapter XII if, at the moment when such action is about to be taken, parties to a dispute likely to cause a breach of the peace could tie the hands of the Magistrate by obtaining a stay of his proceedings and a transfer to another Court. For these reasons we must decline to interfere, but direct that the remarks in this order should be communicated to the First Class Magistrate concerned, so far as they apply to the proceedings taken or to be taken by him.

*Order accordingly.*

## APPELLATE CIVIL

*Before Mr. Justice Fulton and Mr. Justice Crowe.*

1900.
*August* 27.

BHIVA AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* VITHYA AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Vatan—Bombay Act III of* 1874, *Sec.* 18—*Suit for a declaration of right to a share in a vatan, and to participate in the emoluments of the vatan—Jurisdiction of the Civil Court to entertain such suit—Jurisdiction.*

Where the plaintiffs sued to obtain a declaration that they were entitled to a third share in a Maháŕki vatan and to participate in the profits of the vatan,

* Second Appeal, No. 73 of 1900.

1900.

BHIVA v. VITHYA.

*Held*, that under section 18 of Bombay Act III of 1874 the Civil Court had no jurisdiction to make the declaration sought.

*Parsha* v. *Lagmya* (1) followed.

SECOND appeal from the decision of J. B. Alcock, District Judge of Násik, reversing the decree of Ráo Sáheb V. G. Kaduskar, Subordinate Judge of Satána.

Plaintiffs sued for a declaration that as vatandár Mahárs they were entitled to a third share in a Mahárki vatan and to enjoy a third share in the profits of the vatan. They also prayed for an injunction restraining the defendants from obstructing them in the enjoyment of the said share, and for damages.

Defendants denied that the plaintiffs had any share in the Mahárki vatan.

The Court of first instance dismissed the suit on the ground that the plaintiffs had not proved their right to any share in the vatan in question.

On appeal the District Judge held that the plaintiffs had proved their claim. He, therefore, reversed the decision of the first Court and granted the declaration sought.

Against this decision defendants appealed to the High Court, contending (*inter alia*) that the Civil Court had no jurisdiction to entertain the suit under Bombay Act III of 1874.

*S. R. Bakhle*, for appellants (defendants).

*D. A. Khare*, for respondents (plaintiffs).

FULTON, J.:—The plaintiffs sued to obtain a declaration that they as vatandár Mahárs are entitled to a third share in the Mahárki vatan and to enjoy a third share in the profits of the said vatan and to recover Rs. 6 as damages from the defendants, and to obtain an injunction restraining the defendants from obstructing them in the enjoyment of the said share.

There is no dispute about the vatan lands. The plaintiffs, it is admitted, are in possession of the Taralki Inám land and the defendants are in possession of the Mahárki Inám land, neither party claiming any share in the lands held by the opposite party. The whole dispute is about the plaintiffs' right to perform a share

(1) (1838) 13 Bom., 83.

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of the service for the villagers and to receive from them a share of the customary emoluments whether in money or kind (such as the skins of animals).

Now it seems to us that, having regard to section 18 of Bombay Act III of 1874, the Civil Courts have no jurisdiction to make the declaration sought, and consequently cannot award damages or grant the injunction. The decision in *Parsha* v. *Lagmya*[1] is an express authority on the point. Section 18 reserves to the Collector the duty of defining, with the aid of a panchâyat, or otherwise as provided, the nature and extent of the right to levy in money or kind from individuals and the duties to be performed, and the persons, families or classes liable to make payment and to perform the duties: and, if the Civil Courts had concurrent jurisdiction to define such rights and duties of the Mahârs *inter se*, the object of the section, which seems to be to enable the Collector to adjudicate on such matters, if possible by means of a panchâyat, would be frustrated. The learned pleader for the respondents referred us to Part X of the Act; but that part, while conferring on the Collector certain powers for the registration of the names of vatandârs and the determination of their respective responsibilities and duties, does not conflict in any way with the provisions of section 18. He also referred us to the decision in *Govind* v. *Bapuji* [2], which, however, turns on different sections of the Act relating, as it does, to a kulkarni vatan in regard to which there is no section similar to section 18.

Whether a suit by Mahârs would lie for a declaration that they were members of a Mahârki vatan, remains undecided. The present suit, in which the plaintiffs claim a third share in the vatan and to receive a third share of the profits, seems clearly to clash with the Collector's jurisdiction under section 18 to define the nature and extent of the right to levy the emoluments in money or kind, and the persons, families or classes liable to perform the duties.

After such rights and duties have been duly defined, the Civil Courts may have jurisdiction to enforce them; but we think that they have no power to declare their nature or extent.

(1) (1888) 13 Bom., 83. (2) (1893) 18 Bom., 516.

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We must, therefore, reverse the decree of the lower Appellate Court and reject the claim. But as the question of jurisdiction was not raised by the defendants in either of the lower Courts or taken in the memo. of second appeal, and time had consequently to be given for argument, we think it fair to direct that the parties severally pay their own costs throughout.

*Decree reversed.*

## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Crowe.*

GUDDAPPA AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* TIRKAPPA (ORIGINAL DEFENDANT), RESPONDENT.*

1900. *August* 27.

*Res judicata—Civil Procedure Code (Act XIV of* 1882), *Sec.* 13, *Expln. II—Different suits for the same land alleging different titles.*

The plaintiffs sued to recover certain land, alleging that on the death of the widow of the former owner they became entitled as reversioners. They had previously sued the defendant for the same land claiming as the surviving members of the joint family to which the former owner belonged. That suit had been dismissed.

*Held,* that the present suit was barred by the provisions of section 13 of the Civil Procedure Code (Act XIV of 1882).

SECOND appeal from the decision of R. J. C. Lord, District Judge of Dhárwár, reversing the decree of Ráo Sáheb Ezra Reuben, Second Class Subordinate Judge of Háveri.

Suit to recover possession of land. The plaintiffs were first cousins of one Ningappa, who died in 1870 leaving a widow named Chenbasava. She died in 1894 and the plaintiffs took possession of the land in dispute. The defendant Tirkappa was the brother of Chenbasava, and he filed a suit in the Mámlatdár's Court for possession, alleging that his sister Chenbasava had transferred the land to him. The Mámlatdár passed a decree in his favour. The plaintiffs in collusion with the village officers managed to delay the delivery of possession to the defendant and they filed a suit (No. 19 of 1895) in the Subordinate Judge's Court claiming the land as the co-parceners of their cousin Ningappa and

* Second Appeal, No. 198 of 1900.

1900.

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praying for the confirmation of their possession and for an injunction ordering the defendant not to obstruct their possession. That suit was dismissed, the defendant proving that plaintiffs and Ningappa were divided, and that they had lived separate for several years. The defendant in the meanwhile executed the Mámlatdár's decree and recovered possession of the property.

The plaintiffs now sued, claiming possession as the nearest reversioners of Ningappa and not as successors in an undivided family.

The defendant pleaded (*inter alia*) that the suit was barred by sections 13 and 43 of the Civil Procedure Code (Act XIV of 1882).

The Subordinate Judge found that the suit was not barred by sections 13 and 43 of the Civil Procedure Code; that the plaintiffs were the first cousins of Ningappa, and as such were his nearest reversionary heirs, and that the transfer set up by the defendant was not proved. He, therefore, allowed the claim.

On appeal by the defendant the Judge reversed the decree, holding that the suit was barred by the plea of *res judicata*.

The plaintiffs preferred a second appeal.

*K. H. Kelkar* for the appellant (plaintiffs):—The decision of this case depends upon the meaning to be put upon the words 'litigating under the same title' in section 13 of the Civil Procedure Code and the word 'ought' in Explanation II of the section. The plaintiffs sued in their former suit as surviving co-parceners of Ningappa and now they claim the same property as his nearest reversioners. They are not, therefore, litigating under the same title within the meaning of section 13.

[JENKINS, C. J.:—The explanation says that matters which ought to have been in issue must be considered to have been in issue and decided.]

We submit that the explanation says nothing about the decision of the matter in issue—*Kailash Mondul* v. *Baroda Sundari Dasi*[1]. It cannot be said that the plaintiffs ought to have made the second title a ground of claim in the first suit, because the

(1) (1897) 24 Cal., 711.

two titles are dissimilar and inconsistent, and must be supported by different kinds of evidence—*Kameswar Pershad* v. *Rajkumari Ruttan* [1].

[JENKINS, C. J.:—The test is, are the matters in issue in the two suits so dissimilar as to cause confusion?]

In the first suit it was necessary for the plaintiffs to prove the joint character of the property. In the present suit the cause of action is the reversion. As reversioners the plaintiffs became entitled to the property on the death of Ningappa's widow. There is no rule which compels a plaintiff to aver all his titles at one and the same time—*Sheo Ratan Singh* v. *Sheo Sahai Misr* [2]; *Konerrav* v. *Gurrav* [3]; *Girdhar* v. *Dayabhai* [4].

*Narayan G. Chandavarkar*, for respondent (defendant):—In both the suits the causes of action were substantially of the same character and the plaintiffs were litigating for the same property. The principle of *res judicata*, therefore, applies—*Srimut Rajah Mootloo Vijaya* v. *Katama Natchiar* [5]; *Jibunti Nath* v. *Shib Nath* [6].

JENKINS, C. J.:—In this case, the sole question for our determination is the applicability of the plea of *res judicata*: the first Court has repelled the plea, while the District Court on appeal has supported it. The plea is based on Suit No. 19 of 1895 commenced by the present plaintiffs against the present defendant, by which they prayed to be confirmed in possession of the land in suit, and for an injunction. In that suit the plaintiffs alleged that they were entitled to the land, and the title they put forward was that, as the sole surviving members of a joint family, they were its owners. This suit was dismissed on the ground that they had failed to establish their title. Having in the meantime been deprived of possession, the plaintiffs have brought this suit for recovery of the same land alleging a title by heirship as distinct from survivorship, and to this claim it is that the plea of *res judicata* is urged as a bar.

The appellant has before us complained of the needlessly strong language of the District Court, and I think with reason:

(1) (1892) 20 Cal., 79.
(2) (1884) 6 All., 358.
(3) (1881) 5 Bom., 589.
(4) (1882) 8 Bom., 174.
(5) (1866) 11 Moo. I. A., 50, 73.
(6) (1882) 8 Cal., 819.

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it added nothing to the case and merely has served, in some measure, as a weapon with which to attack the judgment of which it is a part. The case, however, must be considered and determined apart from the particular remarks to which objection has been taken, and to this I will now proceed.

The point is governed by section 13 of the Civil Procedure Code, the material part of which is as follows :—

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties.

"*Explanation I.*—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

"*Explanation II.*—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It comes then to this: was the title by heirship a matter which *might* and *ought* to have been made ground of attack in Suit No. 19 of 1895 ? for if so, then it shall be deemed to have been a matter directly and substantially in issue in that suit, and, having regard to the result of the former suit, to have been finally heard and determined adversely to the plaintiffs. That I take to be the plain meaning of the words apart from the decisions to which I will later refer.

Now that the plaintiffs *could* in the former suit have alleged, in the alternative, their title as heirs, is conceded: equally, as it appears to me, they ought to have so alleged it. It was forbidden by no rule of pleading; on the contrary, it was necessary for the complete and final disposal of all questions as to the plaintiffs' title. As, however, Mr. Kelkar for the appellants has called to our attention a large number of cases, which, he maintains, place a different interpretation on the words of the section, it is necessary that I should examine them to see how far they really support his argument.

First I will take the decisions of the Privy Council and of this Court, for they alone are binding on us: and then I will pass to the decisions of the other Courts. The only Privy Council case to which Mr. Kelkar in support of his appeal has called

our attention, is *Kameswar Pershad* v. *Rajkumari Ruttan*[1]; but I fail to see how it assists him, for in that case the plea was sustained. What is apparent, however, from the judgment is, that their Lordships considered that the case should be determined on the words of the section themselves: no authority is even cited. In reference to those words it is said "That it 'might' have been made a ground of attack is clear. That it 'ought' to have been, appears to their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word '*ought*' would become important; in this case the matters were the same. It was only an alternative way of seeking to impose a liability upon Run Bahadur, and it appears to their Lordships that the matter 'ought' to have been made a ground of attack in the former suit, and, therefore, that it should be 'deemed to have been a matter directly and substantially in issue' in the former suit, and is *res judicata*."

The test, therefore, proposed whereby to determine whether it *ought* to have been matter of attack is this: are the matters so dissimilar that their union might lead to confusion? To my mind there is in this case but one answer to that question; that absolutely no confusion would have arisen had the plaintiff in the former suit pleaded in the alternative the title he now sets up. In this connection I may appropriately cite the remarks of Lord Westbury in *Srimut Rajah Moottoo Vijaya* v. *Katama Natchiar*[2]:

"In the first place, it is clear, upon the former record, that the appellant had then the power of relying upon that document as being a valid will. He in effect stated, or might have stated, his defence in the suits of 1856 in the alternative. He might, first, have insisted that it was an undivided property, and that, therefore, the plaintiff in those suits had no interest therein: and, secondly, he might have pleaded, but if it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favour. When a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. The present appellant might have insisted on the validity of the alleged will; but instead of doing so when his suit came on to be heard and decided in the Court of final appeal, he in effect disclaimed

(1) (1892) 20 Cal., 79. (2) (1866) 11 Moore's I. A., at p. 73.

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all title under the instrument as a will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by the appellant of setting up the will were allowed."

It probably would be enough to rest on the principle thus enunciated by the Privy Council; for the principle once ascertained, its application must depend on the facts of each case: but on the whole it will be more satisfactory to examine the rest of the cited cases, or at any rate the more material of them. In *Haji Hasam Ibrahim* v. *Mancharam Kaliandas* [1] Mr. Justice West and Mr. Justice Pinhey upheld the plea, so the decision there does not help the plaintiff. *Sadu* v. *Baiza*[2] must have been decided on the Code of 1859, which did not contain a section in the terms of section 13 of the present Code; so it cannot assist us. *Konerrav* v. *Gurrav* [3] is a decision on Explanation II to section 13 of the Code of 1877, which agrees with the terms of the present Code: it is, therefore, directly in point. The Court in upholding the plea of *res judicata* said (p. 594):

"The rule of *res judicata*, by which our Courts are to be guided, is now contained in section 13 of Act X of 1877. It is clear that the matter at issue in the present case was not heard and finally decided in the former suit, unless it be held that it was constructively in issue in the former suit by reason of the provisions of Explanation II to section 13, which enacts that 'any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.' It is possible that the plaintiff might, in his former suit, have made an alternative case, and have prayed that, if the Court should come to the conclusion that the title which he set up was a bad one, and that he was not entitled to the relief which he claimed, it should nevertheless award to him a different relief, founded upon a different and antagonistic cause of action. The plaintiff might, we say, possibly have been allowed to combine two such grounds of attack in one suit; but we cannot say that he ought to have done so. The injustice and inconvenience of insisting on such a procedure are very clearly pointed out by Garth, C. J., at page 162 of the report of the Full Bench case already referred to—*Denobundhoo Chowdhry* v. *Kristomonee Dossee* (I. L. R., 2 Cal., 152)."

All then that this case comes to is, that there the Court thought the circumstances such that it could not be said the

(1) (1878) 3 Bom., 137. (2) (1878) 4 Bom., 37.
(3) (1881) 5 Bom., 589.

plaintiff ought to have the two grounds of attack in the first suit. No test is proposed, nor any principle laid down, so that we are unable to say how far the decision proceeded on the principle later enunciated by the Privy Council. And when the circumstances of that case are examined, it is at once apparent that they widely differ from those with which we are now concerned, and that the determination to which they led can afford no solution of the question now under our consideration; for the confusion that might have resulted from a combination of the several matters appertaining to that case can afford no clue as to whether here the combination would have had a like result. Whether it would have altered Mr. Justice Melvill's opinion had Lord Westbury's remarks in *Srimut Rajah Moottoo Vijaya* v. *Katama Natchiar* been brought to his notice, I cannot say; but I find that in the later case of *Girdhar Manordas* v. *Dayabhai Kalabhai*[1] he, differing from his colleagues, held that the plea was a bar under the circumstances of that case. Mr. Justice West and Mr. Justice Pinhey it is true came to the opposite conclusion, and on their decision the appellant has relied before us. But as the second suit in that case was commenced in 1874, we naturally find no reference to section 13 of the subsequent codes, so that their decision, like that in *Haji Hasam Ibrahim's* case, is of no assistance in the present case.

The next case cited for the appellants is *Naro Balvant* v. *Ramchandra Tukdev*,[2] where Birdwood and Parsons, JJ., held that a suit in ejectment was not barred by a previous redemption suit in which it was held that the mortgage was not proved. The decision, however, throws no light on the point we are considering; for the case was argued and decided without reference to section 13, but solely on section 43.

And now I come to the last of the cited Bombay cases—*Becharji* v. *Pujaji*[3]—on which Mr. Kelkar relied principally for the remarks of Mr. Justice Candy at p. 54:—

"Here if the Subordinate Judge in the suit of 1883 was right in holding that the agreement was inconsistent with a general right to partition, then admittedly the right procedure was reference to a separate suit. If the Sub-

(1) (1882) 8 Bom., 174. (2) (1888) 13 Bom., 326.
(3) (1889) 14 Bom., 31.

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ordinate Judge was wrong—if, in short, the agreement merely admitted the general right to partition postponing the exercise of the right till the payment of the debts—then it would indeed be a mockery should plaintiff be told that his right is altogether lost because he took the suggestion of the Subordinate Judge, and bearing the burden of all the Court fees and costs in the former abortive suit of 1883, filed a fresh suit on the agreement. Any one with experience of the mofussil must concur with the remark of Garth, C.J., in *Denobundhoo's case* (I. L. R., 2 Cal., at p. 155): 'It seems to me that in a country like this, where, as in the mofussil, good advice may not be always available, a person may not claim a property in a proper manner.' The same opinion is expressed at length by Stuart, C.J., in *Babu Lal* v. *Ishri Prasad* (I. L. R., 2 All., 582 at p. 586) quoted above. He concludes: 'To refuse relief to a plaintiff who makes an apparently just claim simply because his ignorant district pleader had omitted a particular plea in a previous suit, is surely a proceeding of doubtful wisdom.' The many infirmities in pleading in the Bombay mofussil Courts have been alluded to above. To hold, therefore, that plaintiffs cannot now rely on the agreement of 1874 would amount to a denial of justice. Of course if law and authority oblige us so to decide, we are bound by law and authority whatever may be the consequences."

What we have to consider is the actual decision, and it appears to me the *ratio decidendi* was, that the omission from the first suit of that on which the second suit was based, was attributable to the action of the Court in the first suit. How far this was a tenable ground of decision we need not consider: we have no such circumstance here; for it is not suggested that any application was made for an appropriate amendment of the first suit.

This exhausts the cited Bombay cases, and the examination of them, which I have made, leads me to the conclusion that they disclose nothing which should induce us to hold that the circumstances of this case do not fall within the provisions of Explanation II.

Turning, then, to the decisions of the other Presidencies it is no doubt laid down by Brodhurst and Duthoit, JJ., in *Sheo Ratan Singh* v. *Sheo Sahai Misr* [1], that "the law does not require a plaintiff at once to assert all his titles to property, or to be thereafter estopped from advancing them." This comes dangerously near controverting the proposition of Lord Westbury, and unless the statement be qualified it appears to me that it is not a correct exposition of the law. Sir Charles Turner's decision in

(1) (1884) 6 All., 358.

*Sadaya Pillai* v. *Chinni*[1] affords no help: it was a decision on the Code of 1859. In *Ummatha* v. *Cheria Kunhamed*[2] nothing was said as to Explanation II. *Allunni* v. *Kunjusha*[3] can hardly be regarded as supporting the appellants' argument, for there Muttusami Ayyar, J., lays down, that a party is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action.

Reliance has been placed on the opinion of Sir R. Garth expressed in *Denobundhoo* v. *Kristomonee*[4], but the value this opinion would otherwise have possessed, is discounted by the fact that the learned Chief Justice differed from the rest of the Full Bench.

Similarly, I cannot see that the argument is assisted by the decision of Macpherson and Hill, JJ., in *Sarkum Abu Torab Abdul Waheb* v. *Rahaman Buksh*[5], for at p. 88 of the report those learned Judges say, "It is not a case in which the plaintiffs having on a former occasion sued for a certain relief on the strength of one title afterwards claims the same relief on the ground of another title, of which on the former occasion he might have availed himself." At p. 711 of the same volume is the case of *Kailash Mondul* v. *Baroda Sundari Dasi*. But that case is based on the conclusion that in the former suit the matter was not finally heard and determined. How far this view is reconcileable with the decision of the Privy Council in I. L. R., 20 Cal., (*Kameswar* v. *Rajkumari*) to which I have already referred, but which was not cited to the Calcutta Bench, I need not pause to consider. Suffice it to say that in the light of that Privy Council decision it seems to me impossible to hold, under the circumstances of the case, that the matter was not finally heard and decided.

I have now dealt with all the cited cases, and I see no reason to abandon the view I expressed at the outset. In my opinion the plaintiffs ought to have pleaded their heirship as a ground of title; it existed at the date of the former suit; it is not suggested that they were ignorant of it, nor has any tenable ground of excuse been suggested before us. Therefore I hold that section 13

(1) (1879) 2 Mad., 352. (2) (1881) 4 Mad., 308. (3) (1883) 7 Mad., 264.
(4) (1876) 2 Cal., 152. (5) (1896) 24 Cal., 83.

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applies. In coming to this conclusion I have not overlooked the argument based on the difference between the two suits. It has no doubt been held, that "where a previous suit for a declaration of title and confirmation of possession of certain lands has been dismissed on the ground that the plaintiff was not in possession at the time of filing the suit, a subsequent suit for recovery of possession is not barred under section 43 of the Civil Procedure Code"—*Jibunti Nath* v. *Shib Nath*(1). Other decisions to the same effect might be cited, but obviously they involve no principle applicable to the circumstances of this case; for in the cases in which those decisions were pronounced the question of title was unnecessary for the determination of the earlier suit: here, however, that question had to be, and in fact was, decided. The value of this argument may be tested by applying it to the plea, which actually was raised in the former suit; and under the strain of this test Mr. Kelkar felt compelled to concede, that he could not in this suit have re-litigated the claim of title by survivorship. But if this be so, then equally it appears to me impossible to urge that the claim that should have been made is now open to litigation, for the section draws no distinction between the claim that was and the claim that ought to have been made, between the claim actually and the claim constructively made. And this appears to me obvious, when once it is perceived that the adjudication in the former suit determined not only the particular title alleged, but the actual right to the property by whatever title it might be claimed.

The result, then, is that in my opinion the appeal must be dismissed with costs and the decree of the lower Appellate Court confirmed.

CROWE, J.:—The only question arising in this appeal is whether the claim is a *res judicata* having regard to the provisions of Explanation II of section 13 of the Code of Civil Procedure. The plaintiffs in this case are first cousins of one Ningappa, who died in 1870 leaving a widow Chenbasava who died in 1894. They filed a suit, No. 19 of 1895, against the present defendant, the brother of the deceased Chenbasava, to be confirmed in the

(1) (1882) 8 Cal., 819.

possession of the land in dispute on the ground that it was joint family property of themselves and Ningappa and they were undivided co-parceners. The suit was dismissed by the Court on the ground that the family had been separate in estate for many years. No appeal was taken against that decision. Plaintiffs now bring the present suit as cousins and reversionary heirs of Ningappa to recover possession of the land in dispute. The Court of first instance held that plaintiffs were entitled to sue, and awarded the claim. The lower Court held that it did not seem equitable that after having once been sued on a false case the defendant should be allowed to be harassed again by the plaintiff about the same subject-matter, and held that the suit was barred by sections 13 and 43 of the Code of Civil Procedure.

Mr. Kelkar for the present appellants has cited numberless cases which have more or less application to the circumstances of the present case; and it is necessary to look closely at the actual words used by the Legislature. Explanation II of section 13 runs thus :—"Any matter which might and ought to have been made ground of defence or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such suit." The lower Courts have found as a matter of fact that the plaintiffs have lived separate at Kakol from Ningappa and his father who lived at a different village for the last forty-eight or fifty years. When the former suit was brought in 1895, Ningappa had been dead for twenty-five years and his widow had died in the preceding year. The matter now in dispute, namely, that plaintiffs were the reversionary heirs of Ningappa, the last male holder, must have been within their knowledge at that time. It is clear the plaintiffs might have made that relation a ground of attack against the defendant who was the brother of Ningappa's widow and in no way connected with the family, and it is equally clear that they ought to have done so. The remarks of Lord Westbury in *Srimut Rajah Moottoo Vijaya* v. *Katama Natchiar*[1] apply with force to the circumstances of the present case. There the appellant had sued for possession of a zamindári as the nearest male relation of the late owner on the ground that the property was undivided ancestral estate. In appeal he disclaimed

(1) (1866) 11 Moore's Ind. App., 50.

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any title under an alleged will which in reality he pleaded was not a testamentary devise and, therefore, its validity or invalidity was immaterial. Subsequently he brought a suit, founded on the allegation that the will was valid, to recover possession as devisee under the will. Lord Westbury gave judgment and said:

"It is impossible that any such suit should be allowed to proceed. In the first place, it is clear, upon the former record, that the appellant had then the power of relying upon that document as being a valid will. He in effect stated, or might have stated, his defence in the suits of 1856 in the alternative. He might first have insisted that it was an undivided property, and, therefore, the plaintiff in those suits had no interest therein; and, secondly, he might have pleaded, but if it shall turn out to be a divided property, then my title arises under this instrument, and I plead and rely upon it as amounting to a valid devise in my favour. When a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward * * * * On every ground, therefore,—first, on the general ground that the thing was in issue, and that what was in issue must be taken to have been decided by the judgment * * * * * we are of opinion that there is no doubt as to the correctness of the determination of the Court below."

It has been contended by Mr. Kelkar that the cause of action in the two suits is different, that the matters in issue were so dissimilar that their union would have caused confusion, that the former suit was for a declaratory decree to confirm possession, and that the present suit is to recover possession. As their Lordships of the Privy Council remarked in *Soorjomonee Dayee* v. *Suddanund Mohapatter*(1), the term "cause of action" is to be construed with reference rather to the substance than to the form of action. In these cases the cause was in substance to obtain possession of the property. In the case of *Murti* v. *Bhola Ram*(2) the Court held that 'a plaintiff's cause of action consists of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court.' It cannot be disputed that the plaintiffs might have made their present claim a ground of attack in 1895. It is also equally clear to my mind that they ought to have done so. Ignoring the fact that their father had lived apart in a

(1) (1873) 12 Beng. L. R., 304. (2) (1893) 16 All., 165.

different village for fifty years it was open to them to say we are joint co-parceners and claim by right of survivorship, and as an alternative case it was incumbent on them to say that if the Court comes to the conclusion that the family is divided, then we claim as reversionary heirs. As their Lordships remarked in *Kameswar Pershad* v. *Rajkumari Ruttan*(1), "where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' in Explanation II would become important." In the present case the matters were in every respect the same, the only difference being with regard to the evidence on which the right claimed was sought to be proved. I hold that the present matter both might and ought to have been made a ground of attack in the former suit and, therefore, that it must be deemed to have been a matter directly and substantially in issue in that suit, and that, to use the words of Lord Hardwicke in *Gregory* v. *Molesworth*(2), "where a question was necessarily decided in effect, though not in express terms, between parties to the suit, they cannot raise the same question as between themselves in any other suit in any other form."

I am of opinion that the general law as to *res judicata* founded on the principle *nemo debit bis vexari pro eadem causa* applies to this case and that the lower Court has rightly held that the suit is barred. I would affirm the decree of the Court below and reject this appeal with costs.

*Decree confirmed.*

(1) (1892) 20 Cal., 79.

(2) (1747) 3 Atkyns, 626.

## APPELLATE CIVIL.

*Before Mr. Justice Fulton and Mr. Justice Batty.*

1900. *August 27.*

BHAGWANT APPAJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* KEDARI KASHINATH AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Fraudulent conveyance—Sale by debtor in order to defeat an execution—Intent to defeat or delay creditors—Transfer of Property Act (IV of* 1882), *Sec.* 53—13 *Eliz., Cap.* 5, *and* 27 *Eliz., Cap.* 4.

Bhagwant filed a suit against Ganpati, the manager of a Hindu undivided family, to recover a sum of money due to him, and on the same day obtained an order for attachment before judgment of certain property belonging to the defendant and his family. Before the attachment was actually effected, the property in question and other property was sold to Kedari (defendant No. 1). The deed of conveyance was executed on the day the suit was filed, and the order for attachment was made and notice of the order for attachment was given both to the vendor and the purchaser before the deed was registered, but before the attachment was actually effected.

Subsequently the plaintiff obtained a money decree in his suit and then filed this suit against the vendor and purchaser, praying for a declaration that the conveyance was fraudulent and void, and that the property was liable to attachment in execution of his decree.

The lower Courts dismissed the suit, holding that the sale to the vendee was valid although made with the object of defeating the anticipated attachment of the plaintiff. On appeal to the High Court,

*Held*, (confirming the decree) that clause 2 of section 53 of the Transfer of Property Act (IV of 1882) did not apply, as it was not found that the transfer in question was made fraudulently or for a grossly inadequate consideration.

*Held*, also, that although the object of the transfer was to defeat an anticipated execution, that did not show that the intent was to defeat or delay the creditors so as to render clause 1 of section 53 applicable. Such intent would probably be inferred if there was such an inadequacy of consideration as to bring the case within clause 1 of section 53.

Clause 3 of the section only comes into operation when the facts justify the application of clause 1 or clause 2.

SECOND appeal from the decision of E. M. Pratt, District Judge of Sholápur-Bijápur, confirming the decree of Ráo Sáheb N. B. Brahme, Second Class Subordinate Judge at Bársi.

Second Appeal, No. 688 of 1899

One Martand and his sons Ganpati and Shivalinga were members of a joint Hindu family possessed of certain ancestral property.

Ganpati was the manager of the family and, as such, he had borrowed money for family purposes from the plaintiff Bhagwant Appaji.

On the 11th November, 1896, plaintiff filed a suit against Ganpati, as manager of the family, to recover the debt due to him, and on the same day he obtained an order for attachment before judgment of the property in dispute; but before the attachment was actually effected, Martand sold this property along with other property to Kedari Kashinath (defendant No. 1), transferring to him the interests of the whole family in the said property.

On the same day the sale-deed was tendered for registration; but the plaintiff gave intimation of the Court's order for attachment before judgment, both to the vendor and purchaser, in the Sub-Registrar's office.

The property was attached, whereupon the purchaser Kedari applied for and obtained an order for its removal.

The plaintiff obtained a money decree against Ganpati in the above mentioned suit, and subsequently filed the present suit praying for a declaration that the sale of the property by Martand to Kedari was fraudulent and colourable, intended to defeat the execution of his decree and, therefore, void, and that the property conveyed by the sale-deed was liable to attachment and sale in execution of his decree against Ganpati.

The Court of first instance held that, though the object of the sale was to defeat an anticipated execution, the sale was effected for a valuable consideration, and was valid, and that the property was not liable to attachment and sale in execution of plaintiff's decree.

This decision was upheld in appeal by the District Court.

The plaintiff preferred a second appeal to the High Court.

*S. A. S. Setlur* (with *B. N. Bajekar*), for appellant (plaintiff).

*P. M. Mehta* (with *M. B. Chaubal*), for respondents.

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BATTY, J. :—In this case the plaintiff sued to obtain a declaration that certain property was liable to attachment in execution of a money decree obtained by him against defendant No. 3 (Martand) and No. 4 (Shivlinga), and to have cancelled as fraudulent and colourable a document purporting to convey that property to defendant No. 1.

The document was admittedly executed on the day the order for attachment was made and registered, after notice had been given at the Registrar's office both to the transferor and the transferee that the order for attachment had been made, but before the attachment had been actually effected. The attachment of which the plaintiff gave notice was admittedly an attachment before judgment, and the suit in which it was granted was instituted on the same day as that on which that attachment was ordered and on which the document in question was executed. The property was released from attachment on the application of the transferee.

Both the lower Courts found that execution and registration of the document in question were duly proved, and that the transaction had not been shown to be without consideration; that, therefore, although the object of the sale was admittedly to defeat the anticipated execution, the property was not liable to attachment in execution of the decree.

The plaintiff in this appeal alleges not only that the document in question was void and colourable, but also that the defendant No. 1 was not a *bonâ-fide* purchaser for value, and that as notice of the impending attachment had been given before the registration of that document, the sale was a fraud on the plaintiff and voidable at his option under section 53 of the Transfer of Property Act, 1882, as made with the object of defeating execution. It is further contended that the burden of proving consideration for that document should have been placed on the defendant; that there was no money paid; that the entry in the books of the defendant refer to cash as paid, and that although prior debts are alleged as consideration, there was no adjustment of those debts before the execution of the document; that the object of the sale being to defeat execution of the plaintiff's decree,

the onus of proving that the transaction was entered into in good faith should have been placed on the defendant No. 1, the transferee, as held in the case of *Narayana Pattar* v. *Viraraghavan Pattar*(1), and that under the ruling in *Natha* v. *Dhunbaiji*(2), where all the cases were fully considered, it is necessary that a finding should be obtained on the question whether the transaction was *bonâ fide*. In the case of *Ishan Chunder Das* v. *Bishu Sirdar*(3) the facts, it was contended, were different; for there no notice had been given of the intention of the transferor to defeat the execution of a decree as in the present instance, there was only knowledge of an impending execution, and the lower Courts had not found that there was such an intention. And if there is doubt as to the finding of the lower Courts on the facts, a remand should, it is urged, be directed in order to obtain a distinct decision on the point.

For the respondent, on the other hand, it is contended that the onus was throughout on the plaintiff, and the lower Courts having clearly found that there was nothing to show want of consideration for the transfer, the fact that it was entered into with knowledge or notice of intended process, or even with intent to defeat such process, was immaterial. The cases of *Rajan Harji* v. *Ardeshir Hormusji*(4) and *Joshua* v. *Alliance Bank of Simla*(5) were cited in support of these propositions, and it was urged further that the issue now raised was a new one which could not be entertained for the first time on second appeal.

There can be no room for doubt that an erroneous finding of fact, however gross or inexcusable the error may seem to be, could afford no ground for entertaining this appeal unless it be shown either that there was error in procedure or that there was no evidence before the lower Court proper for its consideration in support of that finding, though, on the other hand, inferences drawn from the facts found might be called in question in second appeal—*Lachmeswar Singh* v. *Manowar Hossein*(6), *Ramgopal* v

(1) (1899) 23 Mad., 184, at p. 189.
(2) (1898) 23 Bom., 1.
(3) (1897) 24 Cal., 825.
(4) (1879) 4 Bom., 70.
(5) (1894) 22 Cal., 185.
(6) (1891) L. R., 19 I. A., 48; S. C., 19 Cal., 253.

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*Shamskhaton*[1], which follows the ruling in *Durga Chowdhrani* v. *Jewahir Singh*[2] and *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani*[3] and *Pertab Chunder Ghose* v. *Mohendranath Purkait*[4]. In this case, therefore, unless the lower Courts have misplaced the onus, or were bound on the facts as found to conclude that the transfer in question was voidable under section 53 of the Transfer of Property Act, 1882, at the option of the plaintiff, this Court cannot now interfere.

The appellant's pleader has not been able to cite any authorities in support of the contention that the onus of proving payment of consideration was upon the defendant. The plaintiff as suing to establish his right to attach the property as that of his judgment-debtor must prove that right—*Shekh Adam* v. *Jamnadas*[5]. More especially as the order passed on the application for the removal of the attachment was against him—*Govind Atmaram* v. *Santai*[12]; *Tillakchand Hindumal* v. *Jitamal Sudaram*[7]; *Rajan Harji* v. *Ardeshir Hormusji*[8]; see also *Hale* v. *Metropolitan Saloon Omnibus Company*[9]. The ruling in the case of *Narayana Pattar* v. *Viraraghavan Pattar*[10], relied upon for the appellant, does not touch the question as to the burden of proving absence of consideration, but merely lays down that where a document secures debts not due, the effect is, quoad such fictitious debts, to defeat or delay creditors, and that it would lie upon the parties who wish to take advantage of such a document to show that there was no such intention and that the document does nothing further than create a preference in favour of certain creditors over the rest. In other words, the ruling does not relieve a judgment-creditor impugning such a document from the burden of proving that it was without consideration, but only shifts the onus as to good faith when it has been shown that part of the ostensible consideration is illusory.

(1) (1892) L. R., 19 I. A., 228; S. C., 20 Cal., 93.
(2) (1890) L. R. 17 I. A. 122; S. C., 18 Cal., 23.
(3) (1887) L. R., 14 I. A., 101; S. C., 14 Cal., 740.
(4) (1889) L. R., 16 I. A., 233; S. C., 17 Cal., 251.
(5) (1891) 17 Bom., 94 at p. 99.
(6) (1887) 12 Bom., 270.
(7) (1873) 10 B. H. C. R., 206.
(8) (1879) 4 Bom., 70.
(9) (1859) 28 L. J., Ch. 777.
(10) (1899) 23 Mad., 184 at p. 189.

Practically this proposition is merely a statement of what is contained in the second paragraph of section 53 of the Transfer of Property Act, 1882. It is of course open to a party to sustain the onus cast upon him, by the facts which he may elicit by cross-examination of the other party's witnesses—*Moti Kahanji* v. *Dipchand Virchand*[1]. But it does not appear in this case that the plaintiff in the Court of first instance questioned the existence of the debts which were alleged to have formed the consideration for the document which he impugned. The form of the issues implied that the onus was upon him: he apparently accepted it without demur, and even had it been misplaced, it is doubtful whether the irregularity could be regarded as having prejudiced him on the merits—*Dinkar Ballal* v. *Hari Shridhar*[2] which follows *Moti Kahanji* v. *Dipchand Virchand*[1] and *Makund* v. *Bahori Lal*[3]. It seems, then, that the decision of the lower Courts, that want of consideration was not proved, is not open to challenge now on second appeal.

It remains to consider whether on the further finding of fact arrived at by the lower Appellate Court, namely, that the object of the sale was to defeat an anticipated execution, that sale was voidable at the option of the plaintiff, the attaching creditor, under the provisions of section 53 of the Transfer of Property Act, 1882. There does not appear to be absolute unanimity of judicial decision on the questions whether the section under discussion alters the pre-existing law governing such cases. Whitley Stokes in his note on the section[4] says that it replaces the statutes of Elizabeth (13 Eliz., cap. 5, and 27 Eliz., cap. 4) repealed by the Act. In *Ishan Chunder Das* v. *Bishu Sirdar*[5], however, it was said that though the Statute 13 Eliz., cap. 5, forms in part the groundwork of section 53, "its language is different, and the Indian law goes much further than the English statute." It has been urged that the decision in *Natha* v. *Dhunbaiji*[6] also deals with the section as having added somewhat to the law established by earlier authorities. But that case was one concerning settlements, the consideration for which was held to be grossly inadequate if not

(1) (1868) 5 B. H. C. R., 81, A. C. J.
(2) (1889) 14 Bom., 206, at p. 210.
(3) (1881) 3 All., 824.
(4) Anglo-Indian Codes, Vol. I, p. 767.
(5) (1897) 24 Cal., 825 at p. 828.
(6) (1898) 23 Bom., 1.

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wholly illusory. So that the decision would appear to be in harmony with the precedents established under the statutes repealed by the Indian Act. In the case of *Joshua* v. *Alliance Bank of Simla*(1) it was distinctly held that section 53 does not alter in any respect the law such as it existed in this country at the time the Act was passed, and that if any such change in the law were intended, the terms of section 53 are curiously inapt for expressing any such intention. That judgment, no doubt, dealt specially with a case falling under 27 Eliz., cap. 4, but the language quoted clearly indicates that in the opinion of the Court no change *whatever* was intended by the Legislature.

Now although the question whether the statutes 13 Eliz., cap. 5, and 27 Eliz., cap. 4, extended to India, seems to have remained more or less *in dubio*, in *H. H. Azim Unnissa Begum* v. *Dale*(2), Stat. 13 Eliz., cap. 5, was regarded as so extending,—and as between British subjects other than Hindus or Mahomedans, 27 Eliz., cap. 4, was also so considered on implications from *Freeman* v. *Fairlie*(3) and *Mayor of Lyons* v. *East India Co.*(4), and its applicability seems to have been taken for granted in *Judah* v. *Mirza Abdool Kurreem*(5). In *Joshua* v. *Alliance Bank of Simla*(6) it was considered that these two statutes were no doubt in force in this country at any rate on the Original Side of the Court, *i. e.*, in the Presidency towns. West, J., in *Rangilbhai Kalyandas* v. *Vinayak Vishnu*(7), however, undoubtingly asserts that 'the English Statute 13 Eliz., cap. 5, has not, as such, any operation in the mofussil in India, but adds that it embodies principles of general application on account of their essential equity.' The Privy Council in the case cited by him, *Abdul Hye* v. *Mir Mohammed Mozaffar Hossein*(8), more guardedly observe that "whether or not the statute (13 Eliz., cap. 5) (which may not extend to, or operate in, the mofussil in India) is more than declaratory of the common law, so far as it avoids transactions intended to defraud creditors, there seems to be no doubt that its principles and the principles of the common law for avoiding fraudulent conveyances have been given

(1) (1894) 22 Cal., 185 at p. 202.
(2) (1863) 6 Mad. H. C. R., 455 at p. 471.
(3) (1828) 1 M. I. A., 305. *Vide* footnote.
(4) (1836) 1 M. I. A., 175.
(5) (1874) 22 Cal. W. R., 60 C. R.
(6) (1894) 22 Cal., 185 at p. 206.
(7) (1887) 11 Bom., 666 at p. 675.
(8) (1883) L. R., 11 I. A., 10; S. C. 10 Cal., 616 at p. 624.

effect to by the High Courts of India, and have properly guided their decisions in administering law according to equity and good conscience." It must, therefore, be taken that the statutes in question, and the authorities based thereon, may be accepted as unmistakeable guides to the law in India on the subject prior to the enactment of the Transfer of Property Act, 1882. And inasmuch according to accepted canons of construction[1] the presumption "is that the Legislature does not intend to make any alteration in the law, beyond what it explicitly declares, either in express terms or by unmistakeable implication," it remains to consider whether there is any thing in the wording of section 53 which is irreconcileable with the principles embodied in the statutes of Elizabeth, as interpreted by authoritative judicial decision.

Shephard and Brown in their commentary on the section remark "that the section merely reproduces certain of the propositions contained in these statutes" and add (somewhat superciliously) that "no attempt is made except in the second clause to represent the result of three centuries of decisions on the statutes." On a review of the leading authorities, however, the words of the section, when carefully studied, appear to have embodied all the main principles recognised as established by the result of the long current of accepted decisions under the statutes in question.

It seems hardly necessary to note that in certain respects section 53 does not even purport to go so far as the statutes of Elizabeth. For while 13 Eliz., cap. 5, applies to transfers both of realty and personalty, section 53 of the Indian Act applies only to *immoveable* property. With the provisions in the section corresponding with those of 27 Eliz., cap. 4, which relates to realty only, we are not in this case concerned. For that statute was for the protection of purchasers only, which term, though it includes of course mortgagees, could not include a mere holder of a money decree who is not a purchaser within the meaning of the statute—*Beavan* v. *Earl of Oxford*[2] and *Benham* v. *Keane*[3]. No

(1) Maxwell on Interpretation of Statutes, C. iii, Sec. 1, p. 96, 2nd Ed.

(2) (1856) 6 DeG. M. and G., 507 at p. 532.

(3) (1861) 31 L. J. Ch., 129 at p. 132.

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charge on specific property having been acquired by the decree-holder, he could no more avail himself of 27 Eliz., cap. 4., than he could of the doctrine of *lis pendens*. Nor have the Bankruptcy-laws and cases decided thereunder any application in the present instance. Section 53 makes no reference to the principles governing such cases, and it will be necessary to refer to them only for the purpose of indicating the lines of demarcation distinguishing them from cases the circumstances of which give no occasion for the consideration of questions of mere preference to the prejudice of creditors generally.

It will be convenient first to consider what are the nett results of the decisions and then to discuss the question how far the section is in harmony with those results. Among the earliest of the reported Indian cases on this branch of law, are those of *V. Sankarappa* v. *Kamayya*[1] and *Tillakchand Hindumal* v. *Jitamal Sudaram*[2] which cites the first quoted case. Both of these cases follow the English law and rule that 'where there is a real transaction between the parties for valuable consideration, whether it be by way of sale or mortgage, the transaction is valid even as against a creditor, though the object may have been to defeat an expected execution'—*V. Sankarappa* v. *Kamayya*[3]—'but that if the transaction be only a colourable transaction, not intended to confer upon the vendee or mortgagee any beneficial interest in the property, but simply to substitute such vendee or mortgagee as a *nominal* owner in lieu of the real owner (the judgment-debtor) with the object of screening the property from execution, the vendee or mortgagee is a mere trustee, and the judgment-creditor is entitled to attach the property'—*Tillakchand Hindumal* v. *Jitamal Sudaram*[4]. In both of these cases, consideration was passed and they, therefore, correspond with cases contemplated in the first para. of section 53 as controlled by the third para. of that section.

In *Tillakchand* v. *Jitamal*[5] the consideration consisted of time-barred debts, still unsatisfied, which, as was pointed out, would under clause (3) of section 25 of the Indian Contract

(1) (1866) 3 M. H. C. R., 231.
(2) (1873) 10 Bom. H. C. R., 206.
(3) (1866) 3 M. H. C. R., 235.
(4) (1873) 10 B. H. C. R., 210.
(5) (1873) 10 B. H. C. R., 215.

Act, 1872, suffice to support a contract. The judgments in these cases cite *Wood* v. *Dixie*(1), *Darvill* v. *Terry*(2) and *Hale* v. *The Metropolitan Saloon Omnibus Co.*(3). In *Wood* v. *Dixie* Lord Denman, C. J., observed: "We were clearly safe in going so far as to say that a *mere* intent to defeat a particular creditor does not constitute a fraud," and the result of the decision as given in the head-note is that a sale of property for good consideration is not either at common law or under Statute 13 Eliz., cap. 5, fraudulent and void merely because it is made with the intention to defeat the expected execution of a judgment-creditor. In *Darvill* v. *Terry* a bill of sale by way of mortgage had been given of household goods as security for a debt of £130 then due, and further advance of £160 then to be made, but not paid till two days later, and there was evidence that before the mortgage the transferee "was aware that an execution might be expected against the transferor's goods." The goods remained in possession of the transferor and were so when seized under a writ of *fi: fa.* The Judge *left to the jury* the question whether the transaction was *bonâ fide* or a mere sham, and inasmuch as the mortgage even if made with the intention of defeating an execution creditor was not necessarily void, the direction was held sufficient.

In *Hale* v. *The Metropolitan Omnibus Co.*, a tradesman expecting the execution of a writ effected a sale of the whole of his furniture and stock in trade, but it was held it was not a sufficient ground for vitiating a sale that it was made to defeat an expected execution,—the onus, said Kindersley, V. C., being on the company (the execution-creditor). In that case "the purchaser and the judgment-debtor were strangers previously" and it was said "suspicion though a ground for most minute and searching investigation is no ground for decision." A still stronger case is *Alton* v. *Harrison*(4). There a trader, a debtor in expectation of a writ, executed a deed of mortgage vesting substantially *all* his property in trustees for the benefit of five of his creditors, though it provided that he was to remain in possession for six months, but not so as to let in any execution

(1) (1845) 7 Q. B. (Ad. & Ellis), 892.
(2) (1861) 30 L. J. Exch., 355.
(3) (1859) 28 L. J. Ch., 777.
(4) (1869) L. R., 4 Ch., 622.

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or sequestration. The deed was held not void, as it was honestly for the purpose of giving security to the five creditors, and was not a contrivance resorted to for his own personal benefit. The document, though stipulating for his continued possession, was regarded as a mortgage not to become absolute for six months. The Court observed that it makes no difference in regard to the statute of Elizabeth, whether the debtor deals with the whole or only part of his property (though this would be most material under the Bankruptcy laws—*Ex parte Saffery*; *Ex parte Winder*, *In re King*; *Ex parte Gibson*, *Smith* v. *Pilgrim*; *Ex parte Tempest*—*vide infra* p. 223). And it was added that "if the deed is *bonâ fide*, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the statute of Elizabeth." This was followed in *Ex parte Games*[1], where a bill of sale of *all* the existing *and after-acquired* property by a mortgage to secure an existing debt and future advances was held not void under 13 Eliz., cap. 5. It was observed that the transaction, however, might have been impeached as an act of bankruptcy, but that no creditor availed himself of it. This last decision is followed in the case of *Ramasamia Pillai* v. *Adinarayana Pillai*[2], which is a decision under section 53 of the Transfer of Property Act, 1882, indicating that the section is in accord with English decisions under 13 Elizabeth. In the case of *Golden* v. *Gillam*: *in re Johnson*[3] a deed of gift by the debtor of all her property in trust for her daughters in consideration of their covenant to pay her debts incurred up to date, was found an honestly intended family arrangement not executed with the object of defeating creditors, and valid under Statute 13 Eliz., cap. 5. It was said (p. 395) "the purpose of the parties was honest and fair and (p. 393) "the effect on a deed of this sort of its being for good consideration is very great" as it "shows at once that there *may be purposes in the transaction other than the defeating or delaying* of creditors and it was for valuable consideration" (p. 397). This case has been followed in *Gopal* v. *Bank of Madras*[4] as answering the question whether a document was void by reason of its having been executed by the transferor in contemplation of his approaching failure

(1) (1879) 12 Ch. D., 314.
(2) (1897) 20 Mad., 465.
(3) (1881) 20 Ch. Div., 389.
(4) (1892) 16 Mad., 397.

and insolvency, by the proposition that "the mere fraudulent intent of the vendor cannot avoid the deed if the purchasers were free from that fraud." The case of *Gopal* v. *Bank of Madras* last cited also followed the decision in *Motilal* v. *Utam*,[1] where the transferor executed on the eve of bankruptcy a sale-deed *of all* the property of the firm for an antecedent debt and fresh advance, and the sale-deed was assailed as void by the holder of a decree against the transferor. *Golden* v. *Gillam* was followed as there were no circumstance showing that the transferee in entering into the transaction was a party to any scheme by the debtor to delay the creditors, although having regard to the circumstance of its having been entered into on the eve of the failure of the firm, it might be regarded as a transaction by which the transferor obtained an unfair preference over the general body of creditors. The case of *Ram Burun Singh* v. *Jankee Sahoo*[2], which is followed in *Ishan Chunder Das* v. *Bishu Sirdar* [3], shows that, if the transferee "gave full *bonâ fide* consideration for his conveyance, then he obtained a good title from the owner notwithstanding that he knew the fact that a judgment-creditor was seeking to get process of execution against the property." Vide *Ram Burun Singh* v. *Jankee Sahoo*[4]. And in *Ishan Chunder Das* v. *Bishu Sirdar* the knowledge of an impending execution was held insufficient to vitiate the transfer. These last cited rulings show that the transferee may succeed even though he knows that the effect of his transaction will be to defeat a particular creditor or even the general body of creditors. But the decided cases seem to go even further than that, and show that though a creditor may consciously and even intentionally obtain a preference over other creditors, by a transfer from a judgment-debtor, the transaction cannot on that ground alone be impeached by any one creditor, if it is for good consideration and retains no benefit for the debtor. The reason for this is not far to seek. For while on the one hand there is no particular reason why a creditor, who by superior activity, has obtained satisfaction or security, should disgorge in favour of a less vigilant creditor, who may possibly have recourse to other

(1) (1888) 13 Bom., 434.
(2) (1874) 22 Cal. W R., 473.
(3) (1897) 24 Cal., 825.
(4) (1874) 22 W. R., 474.

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assets or the general liability of the debtor, neither on the other hand, even supposing all assets to have been swallowed up in the transfer impugned, is there any reason why the unsatisfied creditor should obtain the exclusive benefit of recovering from the alienated property when there may be others equally entitled.

It has, therefore, repeatedly been held that a mere preference over one particular creditor is not a ground for vitiating a transfer, but that such a transaction can only be impeached by the whole body of creditors or by an assignee who represents them. Thus in *Ex parte Cooper*(1) it was laid down that when the result of recovering property alleged to have been delivered by fraudulent preference, would not be for the benefit of the creditors at large, but of an individual creditor, neither the trustee nor the individual creditor in his name can take proceedings. And Mellish, L.J., observed: "The doctrine of fraudulent preference is for the purposes of distribution among the creditors generally, not for the benefit of a single creditor." And *In re Marsden*(2) shows that when there was no act of bankruptcy, the debtor's allowing judgment to go against him by default in a *bonâ fide* suit for a real debt, in that case due to his own father-in-law, no other creditor being in a position to take bankruptcy proceedings, there was no fraudulent preference, the corollary being apparently that unless and until a transaction comes within the purview of the Bankruptcy laws, preference to a *bonâ fide* creditor does not suffice to vitiate it.

On the other hand, in *Dadapa* v. *Vishnudas* (3), where the question arose as to whether a debtor was entitled to be declared an insolvent under section 351, clause (*c*) of the Code of Civil Procedure, the mortgage for past debts alone of nearly the whole of his property to one of his creditors, aware of his embarrassment, during the pendency of a suit by another creditor, was held to be fraudulent, and to give no title to the particular creditor as against the assignees *who represent the creditors generally—Dadapa* v. *Vishnudas* (4). In *Burjorji Dorabji Patel* v. *Dhunbai* (5) it

(1) (1875) L. R., 10 Ch., 510.
(2) (1883) 25 Ch. D., 311.
(3) (1887) 12 Bom., 424.
(4) (1887) 12 Bom., at p. 426.
(5) (1891) 16 Bom., 1.

seems to have been held that the settlement giving a preference could not be set aside as fraudulent and void as against creditors in that suit, because it was not filed on behalf and substantially for the benefit of *all* the creditors—*Burjorji Dorabji Patel* v. *Dhunbai* [1], or by the trustee in bankruptcy or insolvency who represents and acts on behalf of all the creditors. So, as already observed, it was on the same ground that the Court refused to regard as void a sale, otherwise unimpeachable, in the case of *Motilal Ravichand* v. *Utam Jagjivandas* [2], holding that though, as executed on the eve of bankruptcy, it might be regarded as one by which the plaintiff obtained an undue preference, and as such impeached in a suit framed for the purpose by a person representing the body of creditors, it could not be so impeached in a "suit the object of which was to determine whether an *individual* creditor was entitled to attach and sell the property in execution of his own judgment-debt." Indeed, in the case *Curtis* v. *Price* [3] the settlement, which the marginal note shows was voluntary [4], was declared void only as against creditors, "but," Lord Erskine observed, "only to the extent, in which it may be *necessary* to deal with the estate for their satisfaction, it is as if it had never been made. To every other purpose it is good. Satisfy the creditors; and the settlement stands. The Court frequently is obliged to sell the whole estate; though the whole proceeds are not necessarily applicable." A single creditor without any charge upon the specific property alienated, has no better right than the *bonâ fide* alienee to insist on its application to the satisfaction of his claims; it may be in excess of what is necessary, there may be other assets and others having claims on them: and unless the proceedings are of such a nature that the whole estate and all the assets and liabilities can be ascertained and so dealt with as to secure a settlement of all claims by rateable and equal distribution, there is no reason why one particular portion of property should be taken from a creditor who has paid for it, merely in order to render it available for another individual who has no charge on that specific property at all. This seems to have been indicated in the passage already quoted

(1) (1891) 16 Bom., at p. 19.
(2) (1888) 13 Bom., 434.
(3) (1806) 12 Vesey Jun., 89.
(4) *Vide* p. 103.

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from *Wood* v. *Dixie* in which Lord Denman said that "a mere intent to defeat a particular creditor does not constitute a fraud," and that case is quoted in *Suba Bibi* v. *Balgobind Das*[1], where it is accordingly stated that "a genuine sale made for good and valid consideration to one creditor, *even if effected to delay and defeat another*, apart, of course, from cases in which either insolvency or bankruptcy is involved, is not void."

This second group of cases, therefore, leaves no room for doubt that a transaction entered into for good consideration has never, either under the statutes of Elizabeth or under section 53 of the Transfer of Property Act, 1882, been held void or voidable merely on the ground that it would, or even that it must, have the effect of defeating a particular creditor, notwithstanding that the transferee might know that it would have that effect. The obvious and known effect of the advantage to be gained and even the intention to profit by it are insufficient to prove an intention to defraud. An intention to gain an advantage for one's self may incidentally involve loss to another. But it is not identical with an intention to cause such loss. More must be proved. The intention must be not only to get beforehand as against one individual claim, but so to affect the general assets of the debtor as to leave them inadequate for his liabilities as a whole, which otherwise may be satisfied from the remaining property. The defeat of creditors must be the "*dominant* motive"—*Rangilbhai Kalyandas* v. *Vinayak Vishnu*[2], and this is so even under the Bankruptcy laws (32 & 33 Vict., cap. 71, sec. 92). In *Ex parte Hill*; *In re Bird*[3] which quotes Bacon, C.J., in *Ex parte Blackburn*[4] to the effect that it must be made clearly "apparent that the debtor's *sole* motive was to prefer the creditor paid to the other creditors," Bowen, L.J., held that at least "the real, effectual, substantial view" must be that of giving a preference—*Ex parte Hill*; *In re Bird* [5]. The preference must be the essential object, not merely an incidental or even an inevitable result. So in *Thompson* v. *Webster*[6] a settlement of real estate by a son in embarrassed circumstances and subsequently insolvent, having

(1) (1886) 8 All., 178 at p. 180.
(2) (1887) 11 Bom., 666 at p. 679.
(3) (1883) 23 Ch. Div., 695.
(4) (1871) L. R., 12 Eq. 358 at p. 364.
(5) (1883) 23 Ch. Div., at p. 704.
(6) (1859) 28 L. J., Ch., 700.

been made on his obtaining a loan from his mother who had advanced money to him before, was not void under 13 Eliz., cap. 5, proof being wanting as to *intent* to delay, hinder or defraud creditors. And in *Holmes* v. *Penney*[1] a settlement by a debtor of his life-interests upon trust to his own brother, to pay certain small debts and apply the income towards the maintenance of the debtor and family, as the trustees should think proper, there being perfect *bonâ fides* on their part, was held to have sufficient consideration to support it against other creditors not named therein, and to contain no such trust for the benefit of the debtor as would render any part of the stock so settled liable to the demands of his creditors. In *Middleton* v. *Pollock*[2] an insolvent debtor, who died without being adjudicated a bankrupt, left a memorandum, dated a fortnight before his death, declaring himself a trustee of lease-holds mortgaged to him and of a bill endorsed to secure the repayment of sums placed in his hands for investment, and as he retained no benefit for himself, the Bankruptcy laws not applying, the gift was held *bonâ fide* under 13 Eliz., cap. 5. In the case of a voluntary settlement with intent to defraud or defeat prior, or as in the case of *Spirett* v. *Willows*[3] as explained in *Freeman* v. *Pope*[4] express proof of intent to defraud even subsequent creditors, the fact that sufficient money was retained at the time to pay debts then owing, would not take the case out of 13 Eliz., cap 5. But *Freeman* v. *Pope* shows that "an actual and express intent is necessary to be proved in such cases as *Holmes* v. *Penney*, where instruments sought to be set aside were founded on valuable consideration." [5] It is only "where the settlement is voluntary, the intent may be inferred in a variety of ways. For instance, if after deducting the property which is the subject of the *voluntary* settlement, sufficient available assets are not left for the payment of the settlor's debts, *then* the law infers intent, and it would be the duty of a Judge, in leaving the case to the jury, to tell the jury that they must presume the intent." In voluntary settlements then the intent may be presumed from the effect; in transfers for consideration it must be proved and

(1) (1857) 26 L. J., Ch., 179.
(2) (1876) 2 Ch. D., 104.
(3) (1865) 34 L. J., Ch., 365.
(4) (1870) L. R., 5 Ch., 538.
(5) *Vide* Sir M. Giffard's judgment in *Freeman* v. *Pope*, p. 544.

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must appear to have been the dominant motive. Such appears to be the result of his third group of cases above cited.

But neither the decided cases nor the provisions of section 53 of the Transfer of Property Act, 1882, though they treat consideration as raising a presumption against such intent to defraud, defeat or delay, ignore the possibility of the *co-existence* of such intention with the actual payment of consideration by the transferee. The following group of cases indicate the nature of the evidence and circumstances necessary to establish such an intention when consideration has moved from the alienee.

The leading authority is of course that known as *Twyne's case*[1]. There the debtor Pierce was actually indebted to Twyne in £400, and pending the writ in an action by another creditor for £200 made in secret a general deed of gift of all his goods and chattels to Twyne in satisfaction of his debt, but continued in possession of the goods and some of them he sold, shore the sheep and marked them with his own mark. The "marks and signs of fraud" were (1) the gift is general without exception of his apparel or anything of necessity: *quod dolosus versatur in generalibus.* (2) The donor remained in possession and used them as his own and by *reason* thereof he traded and trafficked with others and deceived them. (3) It was made in secret: *et dona clandestina sunt semper suspiciosa.* (4) It was made pending the writ. (5) There was a *trust* between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and trust is the cover of fraud. (6) The deed contains that the gift was made honestly, truly and *bonâ fide, et clausulæ inconsuet semper inducunt suspicionem.* It is rather the cumulative effect of all these indications of fraud than each single one of them taken alone that would now be regarded as conclusive. For, as to the first, we now have *Golden* v. *Gilam*; *Alton* v. *Harrison*; and *Ex parte Games.* As to the second, *Alton* v. *Harrison.* The fourth is not by itself sufficient (*vide* first group of cases cited above) and the sixth is manifestly ground of suspicion only. The modern cases attach the most weight to the third and fifth of this

(1) Smith's Lea. Ca., Vol. I, p. 1. (6th Ed.); Coke, p. 80.

famous list of the marks and signs of fraud, that is to say, to the secrecy of the transaction and the retention of a benefit for the grantor, the deed being "a mere cloak". Thus in the case of *Cracknall* v. *Janson*[1], where for money advanced in 1864 a mortgage was executed in 1871, without pressure for repayment and without previous agreement, and the mortgage-deed was in favour of the debtor's own step-daughter[2] and was not communicated to her till 1874, but given over by the debtor to his wife to keep, it was held void under 27 Eliz., cap. 4, as against a subsequent mortgage of 1871, notwithstanding the existence of consideration. So in *Clarke* v. *Palmer*,[3] where Palmer mortgaged the estate to Sir J. Milbanke in 1862, but was allowed to retain possession of the title-deeds and thereafter in 1863 and 1868 mortgaged to two successive mortgagees, the second of whom assumed the first to be the only incumbrancer, as Milbanke allowed Palmer to deal with the estate as if unencumbered, he was postponed. This case was not dealt with as one falling under either statute of Elizabeth; but the judgment discusses *Perry-Herrick* v. *Attwood*,[4] which was held within 27 Eliz., cap. 4, the Lord Chancellor remarking, "If the intention of the parties to the transaction was that the Misses Attwood should have the security, but that notwithstanding Attwood showed the title deeds that he might be enabled thereby to deal with the estate in favour of third parties, I am strongly disposed to think that the security comes within the statute: it certainly comes within the principle." At any rate a subsequent incumbrancer acting after due inquiry is to be protected against loss in such circumstances—*Clarke* v. *Palmer*[5]. *Bulmer* v. *Hunter*[6] is another instance of the intention, notwithstanding consideration, rendering a transaction void. In that instance there was an antenuptial settlement of all the debtor's property eleven days, followed by marriage six days, before notice of the creditor's action; it left the debtor utterly insolvent and wholly without assets and there was "no doubt that the wife must have known all about the transaction before the marriage, and her solicitor must

(1) (1879) 11 Ch. D., 1.
(2) *Vide* . 22.
(3) (1882) 21 Ch. D., 124.
(4) (1857) 2 DeG. and J., 21.
(5) (1882) 21 Ch. D., 124.
(6) (1869) L. R., 8 Eq., 46.

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also have had notice of all the facts" [1]. This was held void as against creditors under the then Bankruptcy law (section 70 of 24 and 25 Vict., cap. 134). But as it practically enabled the debtor to retain the whole benefit[2] and as "throughout the proceedings there was but one object, which was to commit fraud, it affords an illustration that privity to the fraud, even by a purchaser for value (marriage being good consideration), constitutes an essential distinction which is wanting in such a case as *Campion* v. *Cotton*[3], where it was held "clear that the fact of his (the settlor's) being indebted at the time and of her (the wife) knowing, would not affect the validity of the settlement." It may be noted as supporting this corollary, that in the case of *Ware* v. *Gardner*[4] a post-nuptial settlement (therefore without consideration of marriage), by a trader solvent at the time, assigning *all* his effects future and present upon trust to pay the income to his wife for her separate use was held void under 13 Eliz., cap. 5, though he did not become bankrupt till five years later and had meanwhile satisfied such mortgages as at date of the settlement existed on the property comprised therein. He had continued trading, and the Court observed: "The question is whether by this deed he could have had any other intent than to delay and hinder his creditors, and I am clearly of opinion that he did execute it with that intent, and that this post-nuptial settlement is within the very words of the statute of 13 Eliz., cap. 5." On the other hand, in *Price* v. *Jenkins*[5] a settlement by a widower on remarriage, assigning *leasehold* properties upon trust for himself for life and after his death for his son, was held not to be within the statute of 13 Eliz., cap. 5, "for the assignment of leasehold property to which liability is attached is, in itself, a conveyance for valuable consideration." James, L.J., observed of the responsibility of the trustees for payment of rent, "It might be such a responsibility that a lessee might be actually willing to pay money to get rid of it. If there is *any* valuable consideration for a settlement, the quantum is of no consequence under the statute of Elizabeth."

(1) Pp. 50, 51.
(2) *Vide* p. 51.
(3) (1810) 17 Ves. Jun., 263 at p. 272.
(4) (1869) L. R., 7 Eq. 317 at p. 321.
(5) (1877) 5 Ch. D., 619.

These cases show that where there is no consideration the intent may be presumed, but that the intent to defraud, defeat, delay or hinder must be the sole conceivable or dominant motive, and that if there be consideration, this intent cannot be presumed but must be proved, and must be shown to have been one to which the purchaser for value was a party for the purpose of enabling the debtor to retain a benefit, and that this being proved, the fact that consideration has passed will not avail to save the transaction from any creditor impeaching it as an attempt to defraud, defeat, delay or hinder him.

Instances to the like effect are to be found among cases decided in India. *Rangilbhai Kalyandas* v. *Vinayak Vishnu*[1] is a particularly suitable illustration, as West, J., began his judgment in the case by observing that had the Transfer of Property Act IV of 1882 been introduced into the Presidency of Bombay, the Court would have been spared the necessity of seeking elsewhere for the principles by which to decide the case. Section 53 of that Act, he added, "contains a note which would be directly applicable, and which presents in a compendious form the *result* which we have to reach through a somewhat laborious examination of the authorities" *vide* p. 671. Now in that case the widow of a man who had died in insolvent circumstances, conveyed to his separated brothers the whole of his property. There was consideration which as in *Tillakchand* v. *Jitamal*[2] consisted mainly of time-barred debts due by her deceased husband to the vendees. It was not, therefore, mere want of consideration that vitiated the sale. There was also a contemporaneous agreement by the vendees to settle the claims of the chief creditors of the deceased. But this undertaking had not been communicated to the creditors and was, therefore, susceptible of suppression at will. The vendor, however, did not part with possession, though she executed a note to pay a nominal rent to the vendees. The vendees as near relations had *full* knowledge of the facts (*cf. Bulwer* v. *Hunter, supra*). There was secrecy, as in *Twyne's* case. There was retention of benefit for the transferor, as in *Clarke* v. *Palmer, Cracknall* v. *Janson, Perry-Herrick* v. *Attwood* (*cf. Alton* v. *Harrison* and *Ex parte Games*). The consideration

(1) (1887) 11 Bom., 666.

(2) (1873) 10 Bom., H. C. R., 206.

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was, as in *Cracknall* v. *Janson*, a stale, unenforceable, unpressed debt (contrast *Thompson* v. *Webster*). These circumstances indicate that the "dominant motive," the *causa causans*, without which it is inconceivable that the transaction would have been entered into, was simply to defeat and delay creditors which enabled the debtor to retain the whole benefit using the transfer as a *mere* cloak. A further point it is true was taken in the judgment that the alienating widow was a *quasi*-trustee for her husband's estate and was bound to apply it in equal and impartial discharge of obligations enforceable against it. But it seems to have been, not on that ground, but on the ground that the transaction, if entered into by her husband, would have been set aside, that it was held unsustainable as effected by the widow, though no doubt the argument *a fortiori* was employed. A money decree creditor cannot follow the estate of a deceased person into the hands of a *bonâ fide* purchaser for value to whom it has been alienated by the heir at law—*Bazayet Hossein* v. *Dooli Chund*[1]. But it would seem from *Greender Chunder Ghose* v. *Mackintosh* [2] that this would not apply if it can be proved that the purchaser knew not only that there were debts of the deceased left unsatisfied and that the assets were insufficient and the heir or devisee to whom he paid the purchase-money intended to apply it otherwise than in payment of such debts. This seems to have been accepted in *Kasumunnissa Bibee* v. *Nilratna Bose*[3]. However this may be with regard to the complicity of the purchaser in misapplication of the consideration money, when there is an obligation to apply the assets of a deceased person in discharge of his debts, the main ground of decision in *Rangilbhai* v. *Vinayak*, that complicity in a transaction intended as a mere cloak to enable the debtor to retain as against creditors the benefits which he proposes to transfer, renders that transaction colourable and as such voidable, even though ostensible consideration for the transaction exists, but that there the intentional complicity is not presumed but must be proved. *Rangilbhai* v. *Vinayak* was followed in *Nana Mansaram* v. *Rautmal Tarachand*[4] where

(1) (1878) 4 Cal., 402. The same case is much more fully and correctly reported and noted on at L. R., 5 I. A., 213.

(2) (1879) 4 Cal., 897 at p. 906.

(3) (1881) 8 Cal. 79 at p. 86.

(4) (1896) 22 Bom., 255.

again the ostensible consideration consisted of time-barred and unenforceable debts and where as in *Twyne's* case the property was brought without valuing it and even without inspecting it—and the entire property without reservation purported to pass, possession remaining with the vendor, and even the ostensible consideration was held to be grossly inadequate.

This fourth group of cases then demonstrates the indicia of fraud which must be established against the purchaser for value, before his purchase can be set aside as made with intent to defeat or delay the creditors of the transferor. It is unnecessary to consider here the class of cases which relate specially to the Bankruptcy laws and which, as regards transfers not purely voluntary if made by an insolvent within three months of bankruptcy, insist on pressure in case of an antecedent debt—*Smith* v. *Pilgrim*[1], *Ex parte Saffery*[2] and *In re Gibson*[3] even in the case of a partial assignment, unless there be further advances—*Ex parte Winder*[4] and *In re King*[5]. But it may be noteworthy that the alienation of the assets in their entirety, and the spontaneous alienation for debts which have long remained unpressed, are, even apart from the Bankruptcy law, among the recognised indicia of an intent to delay creditors. For it is improbable the debtor would really wish to part with, or the purchaser would really wish to take every thing, and that where claims long dormant are suddenly revived in view of an execution, the dominant, if not the sole conceivable motive, is to make the ostensible consideration an excuse for the out-and-out withdrawal of the assets. Such circumstances, however, are not by themselves conclusive when the Bankruptcy law is not applicable (*vide Alton* v. *Harrison* and *Tillakchand* v. *Jiamal, supra*), but are only among the signs and marks of fraud, the cumulative effect of which leaves no alternative to the conclusion that the common intent of the parties was to defraud.

It now remains to consider whether the principles deduced from the foregoing cases are in unison with the provisions of

(1) (1876) 2 Ch. D., 127.
(2) (1876) 4 Ch. D., 555.
(3) (1878) 8 Ch. D., 230.
(4) (1875) 1 Ch. D., 290.
(5) (1876) 2 Ch. D., 256.

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section 53 of the Transfer of Property Act, 1882. The first paragraph of that section deals with transfers intended

(*a*) to defraud prior or subsequent transferees for consideration, co-owners and other persons having an interest, and,

(*b*) to defeat or delay the creditors of the transferor.

The first mentioned intent (*a*) comes within the purview of 27 Eliz., cap. 4, as directed against purchasers or others having already a specific interest, and need not, therefore, be discussed in connection with the present case where the transfer is impugned by a mere creditor unsecured.

The portion which relates to the intent to defeat or delay creditors is, however, like the rest of that paragraph, governed by the third and saving provision that nothing in the section shall impair the rights of any transferee in good faith and for consideration. It is also to be noted that where good faith or consideration is wanting and the intent is established, the remedy is given to the person defeated or delayed. The second paragraph provides that the intent to defeat or delay may be presumed from the *effect* if there is no consideration or only a *grossly* inadequate consideration. The result, then, appears to be as follows:—

(*a*) As good faith and consideration render the section wholly inapplicable, a bare intent to defeat or delay is not within the first paragraph of the section at all. This corresponds with the first group of cases cited above.

(*b*) The intent, in order to render a transfer voidable at the option of a single creditor, must be an intent to defeat or delay not only the creditor claiming that option, but the *creditors* of the transferor, *i. e.*, it must so impair the estate as to render it incapable for remaining assets to satisfy its general liabilities: otherwise the creditor can have recourse to other assets. It is not until this general inability of the estate is established, that any person complaining that he has been defeated or delayed can claim the option given by the section. If the untransferred assets suffice to meet all claims, a single creditor cannot prevent the transferor from dealing as he pleases with the surplus. It is open of course to the single creditor to show that though there

may be a residue sufficient to satisfy his own claim, there are other rival creditors who could not all be satisfied and who may come into conflict with him. To do this, it would seem as a matter of procedure, (with which of course the section does not profess to deal), that all other creditors should have an opportunity of being joined, and indeed, if the available assets are insufficient to meet the claim even of a single creditor, there is nothing in the section which is in opposition to the doctrine that the single creditor should adopt a procedure which would give him the exclusive benefit derivable from the avoidance of the transfer. The section only provides that the transfer shall be voidable so as to render the property transferred once more part of the transferor's estate and as such liable to all claims thereon. There seems, therefore, nothing in the second group of cases cited above which is out of harmony with this part of the provisions of section 53.

(*c*) The second paragraph of the section shows that the intent may be presumed from the effect, when the consideration is either wanting altogether or is grossly inadequate. This implies that no such presumption arises from the bare effect of the transfer in any other case. This seems to be in complete accord with the Indian authorities, though it may not be so easily reconcileable with the dictum in the English case of *Price* v. *Jenkins*—that the *quantum* is of no consequence. In this connection, however, it is to be borne in mind that under the third paragraph of section 53—if there be any consideration at all, and also good faith in the purchaser, he would be unaffected even by the second paragraph, so that even inadequacy of consideration coupled with the effect of the transfer to defeat or delay creditors, would not throw the *onus* on the purchaser of showing that it was not *his* intention to contribute to that effect, provided that no want of good faith on his part appeared in the case.

(*d*) It is clear from the second paragraph, as read with the third paragraph of the section, that the presumption of intent cannot arise from the mere effect of the transfer, even though the consideration may be inconsiderable, unless the third paragraph is rendered inoperative by want of good faith in the transferee. That is to say, that the words (in the second paragraph)

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"may be presumed" must be read as subject to the third paragraph, which prevents such presumption arising if there be any consideration at all, and no bad faith to which the purchaser is a party. The transaction may defeat or delay; the transferor may intend that it should; the transferee may know that it will; the consideration may be inadequate, and yet unless the purchaser himself has been wanting in good faith, the presumption referred to in the second paragraph does not arise. In *Joshua* v. *Alliance Bank of Simla*[1], Sale, J., whose judgment in the appeal was confirmed, intimated his opinion that the words "may be presumed to have been made with such intent as aforesaid," should be construed in accordance with the cases decided under 27 Eliz., cap. 4. If cases under 13 Eliz., cap. 5, be equally in point, it would follow that as shown in the third group of cases cited above, the purchaser must have had, as his dominant motive, the desire to co-operate with the transferor in screening the property from creditors and enabling him to use it as a mere cloak for the retention of a benefit. But other considerations may manifestly have been operative with the purchaser, even though he may have been willing to make an exceptionally good bargain for himself and thus have given inadequate consideration. He may be honestly actuated by the keenest regard to his own interest, but he is debarred from acting in the interests of the debtor. That this is the natural meaning of the section appears to follow from the use of the phrase "with intent to defeat or delay," which has manifestly a very different meaning from the phrase "knowing that he will be likely to cause defeat or delay." The word "intent," by its etymology, seems to have metaphorical allusion to archery, and implies "aim" and thus connotes not a casual or merely possible result —foreseen perhaps as a not improbable incident, but not desired —but rather connotes the one object for which the effort is made—and thus has reference to what has been called the dominant motive, without which the action would not have been taken.

(*e*) In cases to which the provisions of the last paragraph of section 53 does not apply, *i. e.*, in cases where there is either no

(1) (1894) 22 Cal., 185, at p. 202.

good faith or no consideratien or where there is no good faith and the consideration is grossly inadequate, there is nothing to prevent the presumption of an intent to defeat or delay creditors arising from a transfer which has the effect of defeating or delaying creditors. This shows (i) that consideration may co-exist with intent to defeat or delay, and this is manifestly in accord with the fourth group of cases cited above; and (ii) that where *neither* consideration nor good faith exists, there can be nothing to rebut that presumption if the effect of the transfer be to defeat or delay *any* creditor, a result which is clearly indicated in the cases (such as *Tillakchand* v. *Jitamal*) treating of purely colourable transactions where the whole transfer is a mere pretence and a sham, and nothing has really passed or was intended to pass on either side.

Thus it appears that every principle of *substantive* law laid down in the cases accepted prior to the Act, is, as regards immoveable property at least, deducible from section 53 of that Act; nor is there anything to show that even in matters of procedure any new departure is inevitable. The view that the Legislature intended no alteration thus seems to be one that may safely be adopted on the authority of *Joshua* v. *Alliance Bank of Simla*. As that position was precisely challenged by the appellants in this case, it has seemed necessary to discuss the point at length in this case, although, as pointed out by the Privy Council in *Norendra Nath Sircar* v. *Kamalbasini Dasi*[1], "the object of codifying a particular branch of law is that on any point specifically dealt with, the law should thenceforth be ascertained by interpreting the language used in that enactment, instead of, as before, searching in the authorities to discover what may be the law as laid down in prior decisions, and the language of such an enactment must receive its natural meaning, without any assumption as to its having probably been the intention to leave unaltered the law as it existed before" (see also *Bank of England* v. *Vagliano*[2] there quoted).

However, in the present instance, as already observed, judicial doubt (I. L. R., 24 Cal., 828) has been expressed as to the extent to which the provisions contained in section 53 are capable of being

(1) (1896) 23 Cal., 563. (2) (1891) Ap. Ca. 107.

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construed as embodying certain well-established principles, and it has, therefore, seemed advisable to consider how far that view is consistent with the facts. The value of certain of the cases cited, in determining the indicia of fraud, is, moreover, not diminished by the existence of an enactment so tersely worded as section 53 of the Act, and it may safely be accepted that absence or gross inadequacy of consideration, the indifference of the purchaser as to the enforcement of any claims he may have had, or to inspection and valuation before purchase, and to the continuance of the transferee in possession or control after purchase, secrecy in making the arrangement, and the attempt to include in it all available assets, must always be considered in determining the existence of good faith. The question of *bonâ fides* is one of fact and as shown in *Darvill* v. *Terry* (*supra*) would in England be left to the jury. It is, therefore, one on which this Court cannot pronounce in second appeal; nor can an objection involving questions of disputed facts as incidental to a point of law be taken in second appeal—*Gavdappa* v. *Girmallappa* [1]. The plaintiff, if he wished to challenge the good faith of the transaction notwithstanding consideration passed, should have raised the point at an earler stage. He cannot do so now. The lower Courts have found against him on the issue which he did raise as to consideration, and there is nothing in the undisputed facts to afford the basis for an inference that the dominant motive of the transferee was to serve the interests of the debtor rather than his own. The facts as they stand show that the plaintiff brought his suit and obtained his order for attachment before judgment on the same day that the transfer was arranged and completed.

The circumstances indicated that it was a race between two competing creditors who should get satisfaction first. And the winner, provided he is not guilty of foul play, is not to be disqualified merely because he runs to win. There was haste no doubt, but that is natural in such a contest. On these grounds I would reject the appeal and confirm the decree with costs.

FULTON, J.:—I concur in the very learned and exhaustive judgment of my colleague and would confirm the decree with costs.

(1) (1894) 19 Bom., 331.

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On the facts found by the District Judge, which were apparently the only facts put forward by the defendants, it is impossible for us to say that the provisions of section 53 of the Transfer of Property Act apply. It was not proved that the disputed transfer was made gratuitously or for a grossly inadequate consideration: the second clause of the section is, therefore, inapplicable. It was found that the object of the transfer was to defeat an anticipated execution, but my learned colleague has given good reasons for holding that this is not equivalent to a finding that the intent was to defeat or delay "the creditors of the transferor." There may or may not have been other creditors and there may or may not have been other property available to meet their claims. From the mere intent to defeat one anticipated execution it does not necessarily follow that there was an intent to defeat or delay "the creditors," though such intent would probably be inferred if it were also found that there was an inadequacy of consideration sufficient to bring the case under clause 2 of the section. In these circumstances it seems impossible for us to say, on the findings of the District Judge, that clause 1 is applicable.

No question, then, arises under clause 3, which only comes into operation when the facts are sufficient to justify the application of clause 1 or 2.

It is unnecessary, therefore, to express any opinion whether, if the plaintiff were compelled to rely on clause 3, he would not be obliged to prove affirmatively the fact both of good faith and of consideration, or whether we could lay down as a matter of law that the recital of the receipt of consideration in the sale deed was sufficient to throw on the defendants the burden of proving want of consideration.

*Decree confirmed.*

# ORIGINAL CIVIL.

*Before Mr. Justice Russell, and on Appeal before Mr. Justice Candy and Mr. Justice Tyabji.*

1900. *July* 11.

TEMPLETON (ORIGINAL PLAINTIFF), APPELLANT, *v.* LAURIE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Cause of action—False evidence not actionable—Conspiracy to give false evidence—Costs—Costs in the cause, meaning of such order made in an interlocutory proceeding.*

No civil action lies against a witness for giving false evidence, and the fact that the evidence is given in pursuance of a conspiracy to obtain the conviction of the accused person does not make any difference. The only remedy against a false witness is a prosecution for perjury.

Where, therefore, a plaintiff sued three defendants for giving false evidence against him in a trial at Bombay, alleging that it was done in pursuance of a conspiracy entered into at Hyderabad to obtain his conviction,

*Held*, that the plaint disclosed no cause of action.

A mere conspiracy to injure a man without an overt act resulting in the injury does not furnish any cause of action. A conspiracy is not illegal unless it results in an act done which by itself would give a cause of action.

Where in an interlocutory proceeding the order as to costs is that the costs thereof shall be "costs in the cause," these words do not mean that costs will follow the event, but that those costs remain to be dealt with by the Court at the hearing, the Judge at the trial having still power to deal with such costs.

THE plaintiff was a resident at Hyderabad, in the territory of His Highness the Nizám, and the three defendants were also residents at Hyderabad.

In March, 1897, the plaintiff was charged at the Criminal Sessions of the High Court in Bombay, under sections 312, 314 and 109 of the Indian Penal Code (Act XLV of 1860), with having caused the death of one Marion Edith Whittaker at Hyderabad by doing an act with intent to cause miscarriage. The three defendants were witnesses for the prosecution.

At the conclusion of the evidence for the prosecution the jury stopped the case, intimating that they did not desire to hear the defence. A verdict of not guilty was returned, and the plaintiff was discharged.

* Suit No. 390 of 1898, Appeal No. 1089.

The plaintiff filed this suit in the High Court of Bombay claiming "two lákhs of rupees by way of damages for the injury and loss which he has sustained at the hands of the three defendants." In effect the plaint claimed the above sum for damages caused to the plaintiff by the three defendants having conspired to procure his conviction of the above offence in order to screen the second defendant and with having with that object given false evidence at the trial in Bombay.

The plaint set forth at length the circumstances of the case and the conduct of the three defendants in connection therewith, *viz.*, the *post-mortem* examination of the body of the said Marion Edith Whittaker, which was held at Hyderabad, and the inquest which took place there at which the three defendants gave (as the plaintiff alleged) false evidence for the purposes aforesaid. It further stated that, at the trial before the High Court in Bombay, the three defendants falsely and maliciously repeated the evidence given by them on the previous occasions, and copies of their respective depositions were annexed to the plaint. The following paragraphs of the plaint are material :—

"30. The plaintiff charges that in his evidence upon the several occasions hereinbefore referred to, the second defendant has sought, in order to save himself from responsibility, to make out that the plaintiff had procured or assisted the deceased Marion Edith Whittaker in procuring an abortion. The three defendants herein have in collusion with one another fabricated and given upon oath evidence false to the knowledge of all of them. The first and second defendants did in collusion and conspiracy with each other intentionally mislead the two doctors operating at the *post-mortem* examination, and all the three defendants have on the occasions hereinbefore referred to given false evidence with a view of substantiating a false theory as to the cause of the death of the said Marion Edith Whittaker in order to mislead the respective tribunals and to secure the conviction of the plaintiff for complicity in the alleged abortion.

"31. A material part, if not the whole, of the plaintiff's cause of action arose within the ordinary original civil jurisdiction of this Honourable Court inasmuch as the conspiracy between the three defendants herein culminated in giving false and malicious evidence to the peril and prejudice of the plaintiff in his trial at Bombay in March, 1897.

"32. The plaintiff alleges that in consequence of the conspiracy and the evidence hereinbefore referred to, and of the prosecution which was lodged against him (which prosecution it would have been impossible to proceed with in the absence of the evidence given by the third defendant), he has suffered

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injury and loss of an almost irreparable character in his business, his reputation and his social position."

The plaint was presented to the Judge in chambers (Strachey, J.), who gave leave to sue under clause 12 of the Letters Patent.

The defendants filed their written statements. Subsequently an order was made for the trial of the following preliminary issues:—

(1) Whether the plaint discloses a cause of action.

(2) Whether this Court has jurisdiction to try this suit.

These issues were argued before Russell, J.

*Macpherson*, *Inverarity* and *Daly* for plaintiff.

*Lang* (Advocate General) and *Starling* for defendant 1.

*Scott* and *Young* for defendants 2 and 3.

RUSSELL, J. (after reading the plaint continued:—) The result may be summarised as follows:—

1. Marion Edith Whittaker died of tetanus, the result of an abortion.

2. The three defendants who had attended her in her last illness formed a false theory as to the cause of her illness and death, *viz.*, that the plaintiff was the author of her pregnancy and had caused the abortion.

3. That the second and third defendants collusively took certain steps to conceal the second defendant's malpractices in the case, while the first and second defendants misled the doctors at the *post-mortem* examination.

4. That all the defendants have conspired to falsely secure the conviction of the plaintiff, and in support of such conspiracy have given false evidence.

5. That the plaintiff has sustained heavy damages by the defendants' conduct.

Stated shortly, this suit is for damages caused to the plaintiff by the defendants having combined falsely to procure his conviction of a criminal offence in order to screen the second defendant.

The first question that now arises is, therefore, does the plaint disclose a cause of action? It was argued by the defendants

and admitted by the plaintiff's counsel, that no action for damages will lie against persons who had given false evidence for doing so—*Baboo Gunnesh* v. *Mugneeram*(1); *Queen-Empress* v. *Babaji*(2); *Queen-Empress* v. *Balkrishna*(3); *Nathji* v. *Lalbhai*.(4) It was further argued that no action will lie for conspiracy unless the overt act is itself actionable, and that the gist of the action was the giving false evidence.

But it will be observed, on referring to the paragraphs of the plaint I have referred to, that the defendants are charged with other overt acts than merely having given false evidence.

In dealing with the case as against all the defendants it would appear that the test to be applied is whether the acts complained of would give the plaintiff a right of action against one of them, or, in other words, has the plaintiff sustained a civil injury at the hands of any one of them: see *Huttley* v. *Simmons*.(5) This involves the consideration of the question whether any right of the plaintiff has been infringed. "It is essential to an action in tort," says the Privy Council in *Rogers* v. *Rajendro*,(6) "that the act complained of should under the circumstances be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do a man harm in his interest, is not enough." What are rights? Cave, J., in *Allen* v. *Flood*(7) says: "The personal rights which we are most familiar with are (1) rights of reputation; (2) rights of bodily safety and freedom; (3) rights of property, or, in other words, rights relative to the mind, body and estate, and if the general word 'estate' is substituted for 'property,' these three rights will be found to embrace all the personal rights that are known to the law." Lord Watson at page 92 of the same report says: "Any invasion of the civil rights of another person is in itself a legal wrong carrying with it liability to repair its necessary or natural consequences in so far as these are injurious to the persons whose right is infringed, whether the motive which prompted it be good, bad or indifferent." Thus

(1) (1872) 11 Beng. L. R. 321.
(2) (1892) 17 Bom. 128.
(3) (1893) 17 Bom. 573.
(4) (1889) 14 Bom. 97.
(5) (1898) 1 Q. B. 181.
(6) (1860) 8 Moo. I. A. 103.
(7) (1898) Ap. Ca. 1 at p. 29.

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the intentional driving away of customers by show of violence—*Tarleton* v. *M'Gawley*,(1) the obstruction of actors on the stage by preconcerted hissing—*Clifford* v. *Brandon*,(2) *Gregory* v. *Duke of Brunswick*,(3) the impeding or threatening servants or workmen—*Garret* v. *Taylor*,(4) the inducing persons under personal contracts to break their contracts—*Bowen* v. *Hall*,(5) *Lumley* v. *Gye*(6)—all are instances of such forbidden acts.

It appears to me that to cause a person to be falsely charged with a criminal offence to the knowledge of the person so causing him to be charged, is an infringement of the personal right of reputation and freedom. At page 114 of Fitzherbert's Natura Brevium, Vol. I, it is said: "If one person of malice and false imagination labour and cause another falsely to be indicted, the party who is so indicted shall not have a writ of conspiracy, &c., but an action upon the case against him who so caused him falsely to be indicted." That being so, it appears to me that each of the defendants is civilly liable to the plaintiff in respect of the acts alleged against them respectively in the plaint other than the giving of evidence against the plaintiff which were done with the object of having the plaintiff falsely indicted. Thus the first and second defendants are charged with giving misleading information to the operating surgeons and with the object of more successfully foisting their false theory as to the cause of death upon the attention of the said surgeons. The first and second defendants or one of them gave a demonstration and a lecture over the body of the deceased lady to a large number of students who were assembled there for the purpose. The first defendant is charged with arranging the *post-mortem* examination so as to prevent any medical man on the part of the plaintiff being present. The second defendant is charged in collusion with the third defendant with having written a letter to the presiding Magistrate with the objects stated in paragraph 14 of the plaint. In paragraph 19 the second defendant is charged with writing another letter to screen himself, but I apprehend that, if only one of the defendants has infringed the personal rights of the plaintiff, the other

(1) (1790) Peak's N. P. Ca. 270.
(2) (1809) 2 Camp. 358.
(3) (1843) 6 M. & G. 205.
(4) Cro. & Jac. 567.
(5) (1881) 6 Q. B. D. 333.
(6) (1853) 2 E. & B. 216.

two who combined towards such infringement would also be held liable.

Treating it as an action against the defendants jointly, I am of opinion that the statement in the plaint discloses a cause of action against them. The plaint charges the defendants with having combined to do certain acts towards the infringement of the plaintiff's rights maliciously, which in its legal sense means a wrongful act done intentionally without a just cause or excuse—*Bromage* v. *Prosser*.[1] The case of *Barber* v. *Lesiter* [2] appears to me to be distinguishable, as there the damage done to the plaintiff did not appear to have been the natural and probable consequence of the defendants' act. In that case Crowder, J., says at page 189 : "The arrest and conviction of the plaintiff seem to have been the result of a combination of circumstances for which the defendant is not in law responsible." Here the damage to the plaintiff is stated to be the direct consequence of the defendants' acts ; so also in *Kearney* v. *Lloyd* [3] the action was held not maintainable because the acts of the defendant did not constitute any legal injury to the plaintiff. In the *Mogul Steamship Co.'s Case* [4] and *Allen* v. *Flood*,[5] the combinations were held not to infringe any legal rights of the plaintiffs, and their action consequently failed. The result is that I am of opinion that the plaint has disclosed a good cause of action against the defendants herein.

The next question that arises is whether this Court has jurisdiction to try the case. Leave to sue under clause 12 of the Letters Patent was granted when the plaint was accepted by Strachey, J. Paragraph 31 of the plaint states how a part of the cause of action is said to have arisen within this jurisdiction. Mr. Macpherson argued that there was a continuing agreement on the part of the defendant to the detriment of the plaintiff, the fruit of which was the evidence given at the Sessions Court in Bombay. I have ascertained from the office of the Clerk of the Crown that the defendants were bound over to give their evidence before the Sessions Court here. The plaint does not

(1) (1825) 4 B. & C. 247.
(2) (1859) 7 C. B. (N.S.) 175.
(3) (1889-90) 26 L. Rep. Ir. 268.
(4) (1892) Ap. Ca. 25.
(5) (1898) Ap. Ca. 1.

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allege that the defendants' agreement continued into this jurisdiction as is suggested. Section 18 of the Civil Procedure Code (Act XIV of 1882) provides as follows :—

"In suits for compensation for wrong done to person or moveable property, if the wrong was done within the local limits of the jurisdiction of one Court, and the defendant resides or carries on business or personally works for gain within the local limits of another Court, the plaintiff may, at his option, sue in either of the said Courts."

The word "wrong" in that section must mean, I apprehend, an actionable wrong. As has been admitted, no action will lie for damage in respect of words spoken by a witness in the witness-box. All that the defendants are alleged to have done to found the jurisdiction is giving false evidence in the Sessions Court in Bombay; but that is not a matter in respect of which the plaintiff is entitled to damages in a Civil Court. The result therefore is that no part of the cause of action has arisen within the jurisdiction, and therefore the suit must be dismissed.

As to costs, I shall be glad to hear counsel on the question, as there have been interlocutory proceedings in the suit, which would have been unnecessary if the plaintiff had at first pressed for these preliminary issues to be decided.

The question of costs was subsequently argued before his Lordship, who gave the following judgment :—

RUSSELL, J.:—As it occurred to me that the summons for the trial of the preliminary issues might have been applied for earlier than it was, and before certain costs had been incurred, I reserved the question of costs for further argument, and it was fully argued before me on the 23rd of January, 1900.

It appears to me that immediately upon the first defendant's written statement being filed on the 21st day of December, 1898, it was open to the plaintiff to have had the question as to whether the plaint disclosed a cause of action and the question of jurisdiction set down for trial on a preliminary issue. The Advocate General, I think, was right in his contention that there was no obligation on the defendants to raise the preliminary issues at all, and it is not the practice in this Court to have the case set down for settlement of issues, although in this instance it will be very desirable to do so.

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An interesting argument was raised as to the meaning of the words "costs, costs in the cause," and I am of opinion that these words do not mean that these costs will follow the event, but that those costs remain to be dealt with by the Court at the hearing. In the Court of Chancery, as is well known, costs have always been in the discretion of the Court, and as a general rule costs will follow the result: see *Bartlett* v. *Wood*(1); *Ferguson* v. *Wilson*.(2) In *Hodges* v. *Hodges*,(3) Jessel, M.R., says: "The dismissal of an action with costs ought to include all costs reserved. I will give instructions to the Registrar always to insert, without any special directions, in all orders made in this branch of the Court the words 'including costs of all applications ordered to stand over until trial and all costs reserved to be disposed of at the trial,' so that it will be for the other side to show why they should not be put in."

But in *British Natural &c. Provident Association* v. *Bywater*,(4) Byrne, J., says: "Where interlocutory applications have been ordered to stand to the trial and are not then mentioned to the Judge, the costs of such applications are to be treated as costs in the action and taxed accordingly, and need not be mentioned in the judgment. Where interlocutory applications have been disposed of, but the costs have been reserved, such costs are not to be mentioned in the judgment, or order, or allowed on taxation, without the special direction of the Judge."

The above expressions "so that it will be for the other side to show why they should not be put in" and "where interlocutory applications have been ordered to stand to the trial and are not then mentioned to the Judge" clearly show that the Judge at the trial has still power to deal with such costs. In *Koosen* v. *Rose*,(5) which Mr. Inverarity brought to my attention, it was held that where, on an application under order 14, the Judge in chambers has made an order as to costs, the Judge at the trial has no jurisdiction to interfere with these costs. But I think that this is a special case, because order 14 specially provides that the Judge in chambers shall deal with the costs. This being so, I have

(1) (1861) 30 L. J. Ch. 614.
(2) (1866) L. R. 2 Ch. 77 at p. 92.
(3) (1877) 25 W. R. 152.
(4) (1897) 2 Ch. 531.
(5) (1897) 45 W. R. 337.

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gone through the proceedings and I have come to the conclusion that the plaintiff must pay all the costs save and except the costs of and incidental to the summons taken out by the second defendant on the 26th June, 1899, calling upon the plaintiff to give security for the costs, which summons was not proceeded with; and also save and except the costs of and incidental to the similar summons taken out on the 9th January, 1900, by the first and third defendants. Save and except these two proceedings, the costs of all the others must follow the result of the case; and I do not think that the second defendant ought to pay the costs of and incidental to the substituted service upon him. The plaintiff opposed the summons to set down the case on preliminary issues and failed on the summons and also on one of the questions raised thereby, and I do not think that there should be any division of costs such as was suggested by Mr. Inverarity. The order for costs will therefore be drawn up in accordance with the above judgment.

The plaintiff appealed. The appeal was heard by Candy and Tyabji, JJ.

*Raikes* and *Jardine* for appellant (plaintiff).

*Lang* and *Starling* for respondents Nos. 1 and 3 (defendants Nos. 1 and 3).

*Robertson* and *Young* for respondent No. 2 (defendant No. 2).

CANDY, J.:—It is unnecessary to recapitulate the introductory facts. The question for our decision may be formulated thus: On the facts recited in the plaint, can it be said that a part of the alleged cause of action arose in Bombay?

The plaintiff says (paragraph 31): "A material part, if not the whole, of the plaintiff's cause of action arose within the ordinary original jurisdiction of this Honourable Court, inasmuch as the conspiracy between the three defendants herein culminated in giving false and malicious evidence to the peril and prejudice of the plaintiff in his trial in Bombay in March, 1897." And again (paragraph 36): "The plaintiff charges that every loss, injury and damage which he has sustained was caused by the conspiracy on the part of the three defendants herein and the

evidence given by them in pursuance thereof." The object of the conspiracy is thus stated (paragraph 30): "All the three defendants have, on the occasions hereinbefore referred to, given false evidence with a view of substantiating a false theory as to the cause of the death of the said Marion Edith Whittaker in order to mislead the respective tribunals and to secure the conviction of the plaintiff for complicity in the alleged abortion."

Now it is admitted that no action will lie against the defendants in respect of the evidence which they gave either at Hyderabad or in the Sessions Court at Bombay. *Primâ facie*, therefore, there is no cause of action arising out of their acts in Bombay, and thus it cannot be said that any part of the cause of action arose in Bombay.

But it is sought to avoid this difficulty by the allegation that the defendants are not sued simply for giving false evidence, but they are sued for the conspiracy by which they conspired together that each one should give false evidence, and as they did give false evidence in Bombay, it follows that they were conspiring in Bombay, and thus there was a cause of action partly arising in Bombay.

The fallacy of this argument lies in supposing that though no action will lie against the defendants for giving false evidence, yet it will lie against them if it be alleged that the false evidence was given in pursuance of a conspiracy. If this argument were good, then though no action would lie against A for giving false evidence, yet, if there were more witnesses than one who gave false evidence against the plaintiff, then an action will lie against A, B, C, &c.; for it is difficult to suppose a case in which it would not follow, as a matter of course, that the witnesses must have given false evidence in pursuance of a conspiracy.

It is impossible by a system of permutation and combination to render of no effect the rule of law, and to say that A is not sued for giving false evidence, but for conspiring with B and C that they should give false evidence, and B is sued &c. The fact is that it is no cause of action that the defendants entered into a conspiracy. You must show that the results of that conspiracy have given a right of action to the plaintiff. This was forcibly

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put in the judgment of Lord Esher in *Salaman* v. *Warner*,[1] and similarly reference may be made to the judgment of Palles, C.B., in *Kearney* v. *Lloyd*,[2] which is, as stated by Darling, J., in *Huttley* v. *Simmons*,[3] to the effect that conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would, had they been without preconcert, have involved a civil injury to the plaintiff.

Now it is clear that the acts done in Bombay by the defendants involved no civil injury to the plaintiff. They involved injury no doubt, but not an injury for which compensation could be recovered in a civil action.

Then it was contended that a part of the cause of action was that part of the damage caused to the plaintiff in Bombay. Assuming that such damage is alleged in the plaint, it is, in my opinion, clear that the fact that any damage was suffered in Bombay would not constitute a part of the cause of action. It may be necessary to prove the fact of injury in Bombay in order to ascertain a full measure of damages; but that fact would not constitute any part of the cause of action. If this argument were sound, actions on account of false evidence would always lie, because, although it cannot be denied that giving false evidence furnishes no cause of action, still there would in every case be the damage, which in reality must be taken to be the only and the whole cause of action.

This argument also fails; and, as frankly admitted by Mr. Raikes, it is impossible to twist this case into one of malicious prosecution; it is simply one of conspiracy to give false evidence; and in my opinion the demurrer was rightly upheld by Mr. Justice Russell. The appeal must be dismissed with costs.

TYABJI, J.:—Two questions have been argued before us. The first is whether the plaint discloses a sufficient cause of action, and the second is whether this Court has jurisdiction to try this suit. These two questions were argued before Russell, J., as two preliminary issues. He found the first in the affirmative and

(1) (1891) 65 Law T. 132. (2) (1889-90) 26 L. R. Ir. 268.
(3) (1898) 1 Q. B. 185.

for the plaintiff and the second in the negative and for the defendants.

The plaint was accepted under clause 12 of the Letters Patent, and the question of jurisdiction therefore depends upon the further question whether any material part of the cause of action accrued within the jurisdiction of the High Court. These two questions, though forming distinct issues, are so connected with, and have such a material bearing upon, each other, that the decision of the one will practically dispose of the other. I will however discuss them in the order in which they were treated by Mr. Justice Russell and were argued before us.

The first question, then, is, does the plaint disclose a sufficient cause of action? Now the plaint is an exceedingly lengthy and intricate document, giving the history of the case in great detail, but the draftsman does not appear to me to have very accurately formulated the exact propositions of fact and law on which he intended to base the plaintiff's right to relief. I think, however, the gist and substance of the allegations in the plaint may be shortly stated as a charge of conspiracy on the part of the defendants to obtain the conviction of the plaintiff of a criminal offence, and to give false evidence in furtherance of that conspiracy. The plaint also asserts that, as a matter of fact, the defendants did give false evidence. The conspiracy is alleged to have taken place at Hyderabad out of the jurisdiction, but the false evidence is stated to have been given in the High Court of Bombay within the jurisdiction. In considering whether these facts give the plaintiff a right to sue the defendants in a civil Court, it is to be remembered that this is not a suit for malicious prosecution. There is no allegation in the plaint that the defendants actually prosecuted the plaintiff. As a matter of fact, the prosecution of the plaintiff in Hyderabad is admitted to have been instituted by His Highness the Nizám's Government. The utmost that is alleged against the defendants is that they desired and furthered and aided the prosecution by conspiring among themselves to give false evidence. The substance of the plaint, then, is that the defendants merely conspired in Hyderabad to give false evidence in order to obtain the plaintiff's conviction—and not that they prosecuted him on a false charge.

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Now I am of opinion that this of itself furnishes no cause of action. A mere conspiracy to injure a man without an overt act resulting in the injury does not furnish any cause of action—*Kearney* v. *Lloyd*(1); *Huttley* v. *Simmons*(2); *Salaman* v. *Warner*.(3) If therefore the plaint had stopped at the mere allegation of the conspiracy, it is clear, on the above authorities, that it would not have disclosed any valid cause of action. Does, then, the fact that false evidence is actually asserted to have been given in pursuance of the conspiracy make any difference? I am clearly of opinion that it does not. It has been held over and over again that the giving of false evidence, no matter how malicious and *mala fide* it may be, furnishes no right to sue in a Civil Court, the only remedy being a prosecution for perjury—*Revis* v. *Smith*(4); *Henderson* v. *Broomhead*(5); *Baboo Gunnesh* v. *Mugneeram*(6); and *Dawkins* v. *Rokeby*.(7) The mere fact that the giving of the false evidence is alleged to be the result of a conspiracy does not, in my opinion, make any difference. I should therefore feel inclined to hold that the plaint does not disclose any cause of action, although there are certain other overt acts alleged—such as the giving (though not as the result of the conspiracy) on the part of the first and second defendants, respectively, a demonstration and lecture, the arranging of the *post-mortem* examination in a manner prejudicial to the plaintiff, the writing of letters to the presiding Magistrate—all of which acts were done out of the jurisdiction of this Court.

It follows from what I have said that, in my opinion, nothing is alleged in the plaint to have taken place in Bombay which could give a valid legal right to the plaintiff to sue the defendants in this Court, and that therefore this suit was rightly dismissed for want of jurisdiction. The vague allegations of counsel in argument that damages and mental anguish may have been caused in Bombay, though not specifically stated in the plaint, do not make any difference. I would dismiss the appeal with costs.

*Appeal dismissed.*

(1) (1889-90) 26 L. Rep. Ir. 268, 283, 288.
(2) (1898) 1 Q. B. at pp. 184-5.
(3) (1891) 65 L. T., 132, 134, 136.
(4) (1856) 18 C. B. 126.
(5) (1859) 4 H. & N. 569.
(6) (1872) 11 Beng. L. R. 321.
(7) (1875) L. R. 7 Eng. & Ir. Ap. 744.

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Attorneys for plaintiff:—Messrs. *Edgelow, Gulabchand and Wadia.*

Attorneys for respondents Nos. 1 and 3:—Messrs. *Crawford, Brown & Co.*

Attorneys for respondent No. 2:—Messrs. *Roughton and Byrne.*

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## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Candy.*

1899.
*September* 6.

HIS HIGHNESS THE GAIKWA'R SIRKA'R OF BARODA AND THE B. B. & C. I. RAILWAY COMPANY (ORIGINAL DEFENDANTS), APPLICANTS, *v.* GHANDI KATCHARABHAI KASTURCHAND (ORIGINAL PLAINTIFF), OPPONENT.*

*Practice—Decree—Appeal—Stay of execution of decree—Civil Procedure Code (Act XIV of* 1882), *secs. 545, 546.*

In order to obtain a stay of execution of a decree directing the payment of money the applicant must satisfy the Court on affidavit that substantial loss may result to him unless execution is stayed.

APPLICATION for stay of execution. The plaintiff obtained a decree in the Court of the Subordinate Judge of Ahmedabad for Rs. 17,507 against the defendants as damages sustained by him by reason of their wrongful acts in connection with the construction of a certain railway. The decree further directed the defendants to complete certain "accommodation works" for the passage of water under the said railway.

The defendants appealed. They subsequently obtained a rule *nisi* for stay of execution of the decree pending the appeal. The rule now came on for hearing.

*Macpherson* (with *Crawford, Brown and Co.*) for the applicants (defendants) in support of the rule.

*Brown* (with *Matubhai and Jamietram*) for the opponent (plaintiff) showed cause.

* Civil Application, No. 201 of 1899.

1900.

H. H. THE GAIKWÁR SIRKÁR v. GHANDI.

JENKINS, C.J.:—The decree directs the payment of money and the completion of certain accommodation works. Defendants-appellants seek stay of execution.

As to the works, we grant the stay. As regards the money, we must apply the law as it is.

No order for execution has been made, so section 546 does not apply. We must act under section 545, *i. e.* we must be satisfied that substantial loss may result. We are not so satisfied on the affidavits which have been filed. This will not prevent any application under section 546 should an order for execution be obtained.

Costs to be costs in the appeal, as the applicants have succeeded in part and failed in part.

*Order accordingly.*

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## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.*

1900.
*August* 30.

SHEIK GULAM JILANEE (PLAINTIFF) *v.* KASHINATH BAPUJI DANI (DEFENDANT).*

*Dekkhan Agriculturists' Relief Act (XVII of* 1879), *sec.* 3, *cl.* (*x*)—*Land revenue—Suit for land revenue not a suit for rent.*

A suit for land revenue does not fall under section 3 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The liability for land revenue does not spring from a contractual engagement, and a claim in respect thereof is not one for rent or damages within the meaning of clause (*x*) of section 3 of the Act.

THIS was a reference by Khán Bahádur Navroji Dorabji, Special Judge under the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The reference was in the following terms:—

"The plaintiff sued to recover from the defendant the sum of Rs. 48 for the assessment of certain jághír lands from 1894-95 to 1897-98.

* Civil Reference, No. 9 of 1900.

"The defendant denied the plaintiff's claim.

"The Subordinate Judge awarded the claim.

"The defendant therefore applied for revision.

"The lower Court seems to have treated this suit as one falling under section 3, clause (*x*), of the Dekkhan Agriculturists' Relief Act, and a mark has accordingly been made in the plaint. The defendant therefore had to make a revision application to this Court. The plaintiff's pleader has raised a preliminary objection that this suit cannot be taken to fall under section 3 of the Dekkhan Agriculturists' Relief Act, and therefore a revisional application would not lie.

"It must first be seen what the plaintiff claims in his plaint. The minor plaintiff is the present jághírdár of Wái, and it has been alleged that Sheik Ajimudin, the previous jághírdár, having died on 18th September, 1891, his jághír was attached by Government, who, after setting aside all burdens created by the previous jághírdárs, made the plaintiff a grant of the property as if it were a new jághír on 9th October, 1894, from which date the plaintiff became complete owner of the said jághír; that the lands mentioned in the plaint are in the possession of the defendant as a tenant and the plaintiff has the right to recover the assessment thereof; that the defendant having failed to pay the assessment for 1894-95, an assistance suit was brought before the Mámlatdár of Wái, who, however, passed an order against the plaintiff; that the assessment for four years from 1894-95 to 1897-98 being Rs. 48, should be awarded therefore.

"The defendant contended that the land had been obtained by his father as inám and mirás from a previous jághírdár. That no assessment had been paid since then, and that the plaintiff had no right to obtain any assessment from him.

"It appears that since August, 1836, the defendant and his father have been making use of the land as pôt inámdár without payment of any assessment according to a sanad of the plaintiff's predecessor (Khan Mahomed II).

"The plaintiff's contention seems to be that his predecessor had no right to make any alienation of the land beyond his lifetime, that the land forms part of a saranjám jághír, and as a new grant was made by Government of the said jághír to plaintiff

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in 1894, the defendant cannot any longer hold the land free of assessment.

"The plaintiff's right to claim the assessment had been distinctly contested and denied by the defendant before the Mámlatdár, and the plaintiff was well aware all along that for more than sixty years past the defendant and his father had been in possession and enjoyment of the land without paying any rent or assessment to any one. If the grant by Government of the jághír in 1894 to the plaintiff has given him a right to have the sub-inám of the defendant set aside and to claim assessment from him, the plaintiff must, I think, distinctly sue according to section 42 of the Specific Relief Act to obtain a declaratory decree in his favour to that effect.

"The plaint in this case has been vaguely worded and the plaintiff has fought shy of clearly asking for a declaratory decree affirming his right to claim from the defendant the assessment of the land. The form given to the suit is that of a simple rent suit, as if there was no dispute regarding the plaintiff's right to claim the assessment, and that there had been only a temporary cessation of the payment of the same. It was owing to this defect in the plaint that the lower Court seems to have classed this suit as one for rent and falling under section 3, clause (*x*), of the Dekkhan Agriculturists' Relief Act.

[After referring to Bombay Act V of 1879, section 3, and to *Narayan* v. *Gangadhar* (1) and *Laxman* v. *Rampiarabai*,(2) the reference proceeded:—]

"In the present case although the suit is one for claiming assessment only, yet it has no reference to any written or unwritten engagement to pay the same, and the suit cannot, therefore, be taken to fall under clause (*w*) or (*x*) of the Dekkhan Agriculturists' Relief Act.

"The present suit has been brought by the plaintiff as a trial suit, and he intends to bring several other suits of this description against other holders of portions of the jághír lands.

"The plaint having been defectively framed, the lower Court seems to have been led into treating this suit as one under clause (*x*) for rent. As I am of a different opinion I think it proper

(1) (1888) P. J. 282. (2) (1897) P. J. 290.

to refer, according to section 54 of the Dekkhan Agriculturists' Relief Act and section 617 of the Code of Civil Procedure, the following question for the decision of the Honourable High Court :—

"Whether a suit by an alleged superior holder to recover the assessment of land from the holder of the same, where there is no express or implied agreement to pay the assessment, could be held to be a suit for 'rent' under section 3, clause (*x*), of the Dekkhan Agriculturists' Relief Act.

"As stated above, my finding on the question is in the negative, and I am of opinion that the revision application should be returned to the defendant so that he may prefer an appeal to the District Court."

The reference was argued before a Division Bench (Jenkins, C.J., and Batty, J.)

*Ratanlal Ranchhoddas* for plaintiff.

*G. S. Rao* for defendant.

JENKINS, C.J. :—Had the Special Judge kept clearly before him the provisions of section 617 of the Civil Procedure Code, much time and toil would have been saved : for our chief difficulty has been to learn what the facts are found by him. We think, though not without doubt, the Judge intended to find that what was due from the defendant to the plaintiff was not rent but land revenue : if so, this was a matter that lent itself to a very brief and clear statement. Taking this to be the case, we have to determine whether a suit for land revenue falls within section 3 of the Dekkhan Agriculturists' Relief Act, 1879. In our opinion it does not. While fully recognizing the difficulties the draftsman of the Act has placed in the way of a logical construction of this section, we think that the last clause of sub-section (*w*) relates only to contractual engagements. We are led to this conclusion by the apparent scheme to be inferred from the provisions of the section and by the expression "contracts other than the above" to be found in sub-section (*x*). But it is, we think, clear that the liability for land revenue does not spring from a contractual engagement, nor is the claim in respect of it one for rent or

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damages within the meaning of sub-section (*x*). No other ground for inclusion in this section has been urged before us. Therefore we would answer the matter referred by stating the opinion that a suit for land revenue does not fall under section 3 of the Dekkhan Agriculturists' Relief Act, 1879.

*Order accordingly.*

## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.*

1900.
*September* 18.

MOHANCHAND NEMCHAND GUJAR (ORIGINAL DEFENDANT), APPELLANT, *v.* ISAKBHAI TANAJI (ORIGINAL PLAINTIFF), RESPONDENT.*

*Tenants-in-common, rights of against each other—Trespass—Exclusion from common property.*

Laying a drain in land and the incidental temporary interference with the soil necessary for that purpose cannot be regarded as an ouster or destruction or an act of waste, and will not entitle a tenant-in-common of the land to maintain an action against another tenant-in-common.

SECOND appeal from the decision of H. F. Aston, District Judge of Poona, confirming the decrees of Ráo Sáheb V. V. Vagh, Subordinate Judge of Talegaon.

Suit for an injunction restraining the defendant from laying a drain pipe in land held in common by the plaintiff, the defendant and others.

The plaintiff Isakbhai and defendant Mohanchand respectively were owners of certain plots of land with houses thereon which abutted on the strip of land in question in this suit. This strip of land belonged to the several owners of the land abutting upon it as tenants-in-common, and was only used by them as a means of access to their respective lands.

The defendant commenced to lay a drain pipe under the land and along one side of it for the purpose of carrying off the drainage from his premises. The plaintiff now sued to restrain him from allowing the waste water from his house to pass through this land either through a drain or otherwise. The plaintiff alleged that the said waste water would be a nuisance to him.

* Second Appeals Nos. 261 and 262 of 1900.

There was also a suit by Mohanchand against Isakbhai praying for an injunction restraining Isakbhai from preventing him from constructing his drain.

The lower Court held that Mohanchand had no right to conduct the waste water of his house over the abovementioned strip of land and granted the injunction prayed for in the first of the above suits and refused it in the second.

On appeal the decrees in both suits were confirmed.

Mohanchand (defendant in the first suit and plaintiff in the second) thereupon preferred two separate second appeals (Nos. 261 and 262 of 1900).

*Mahadev V. Bhat* for the appellant Mohanchand (defendant in the first suit and plaintiff in the second) :—The lower Courts were wrong in granting the injunction. We have a right to make a drain under the land which is held by us in common with the plaintiff and others. This drain is necessary for our house. It will be underground and will not interfere with the use of surface by the other tenants-in-common. We have a right to use the land as we propose, provided only that we do not interfere with the rights of the other tenants-in-common.

*Narayan M. Samarth* for the respondent Isakbhai (the plaintiff in the first suit and defendant in the second) :—We say the drain will be a nuisance to us and to all the other tenants-in-common of this land. Moreover, the user which the appellant desires will have the effect of destroying the right of the other tenants-in-common to the subsoil.—*Rajendro Lall* v. *Shama Churn*[1]; *Kanakayya* v. *Narasimhulu*.[2]

JENKINS, C.J.:—The plaintiff and defendant are neighbouring owners, and the relative position of their premises is shown by the plan, which is one of the exhibits in this case. The plaintiff owns those premises which are coloured red, while those that are coloured yellow belong to the defendant, and it will be seen that all these premises abut on a strip of land which is uncoloured on the plan. This strip of land belongs, according to the lower Court's findings, to the several owners of abutting premises

(1) (1879) 5 Cal. 188. (2) (1895) 19 Mad. 38.

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as tenants-in-common, and the only use to which it is put is as a means of access to those abutting premises.

The defendant proposes, and has commenced to lay a drain pipe under the surface of this piece of land and along its north side for the purpose of carrying off the drainage from his premises. To this the plaintiff as the owner of the yellow strip objects, and he has accordingly brought this suit praying for an injunction restraining the defendant "from conducting the waste water of his house through the land which is the way of the plaintiff either by laying out a drain or without a drain." There is a companion cross-suit by the present defendant, in which he seeks to restrain the present plaintiff's interference with his laying of the drain, and the appeal in that is No. 262 of 1900.

As the parties must for the purposes of this appeal be taken to be tenants-in-common, the question for our determination is, whether the acts and proposals of the plaintiff are in excess of his rights as a tenant-in-common. There can be no question that one of two tenants-in-common does exceed his rights if by any act he ousts his co-tenant either actually or constructively from enjoyment of the common property, and as a consequence of this if he destroys it. Thus it is laid down by Lord Hatherly in *Jacobs* v. *Seward*[1]: "The cases in which trover would lie against a tenant-in-common are reducible to this. They are cases in which something has been done which has destroyed the common property, or where there has been a direct and positive exclusion of the co-tenant-in-common from the common property, he seeking to exercise his rights therein and being denied the exercise of such rights."

Starting, then, with this general principle we have to see whether this case falls within it. In our opinion when regard is had to the character of the common property, neither what the defendant has done, nor what he proposes, is an infringement of the rights of his co-tenant giving rise to a cause of action; for the laying the drain and the incidental temporary interference with the soil cannot, as it seems to us, be regarded either as an ouster or destruction or even an act of waste. This view is in accord-

(1) (1872) L. R. 5 E. & Ir. App. 464 at p. 474.

ance with the opinion expressed in *Cubitt* v. *Porter*,(1) and later adopted in *The Standard Bank of British South America* v. *Stokes* (2) by Sir George Jessel, where he says (pages 71 to 73) :

"But supposing I were driven to the conclusion that the plaintiffs and defendant were tenants-in-common, what would their rights be? Now as to that, the very case to which I have been referred enables me to give an answer, and that case is the case of *Cubitt* v. *Porter*.(3) All the three Judges there, and very eminent Judges they were, were agreed that you cannot have an action by a tenant-in-common against another tenant-in-common merely because he pulls down the wall which belongs to them as tenants-in-common, if it is a temporary thing; 'a temporary removal with a view to improve part of the property on one side at least, and perhaps on both.' 'There is no authority to show that one tenant-in-common can maintain an action against the other for a temporary removal of the subject-matter of the tenancy-in-common, the party removing it having at the same time an intention of making a prompt restitution. It was not a destruction. The object of the party was not that there should be no wall there, but that there should be a wall there again as expeditiously as a wall could be made.' I read that from the judgment of Mr. Justice Bayley.(4) Then Mr. Justice Holroyd says this (5) : "Taking it to be the law that where there is a complete destruction by one tenant-in-common of that which he has in common with others, so that that other is wholly deprived of the use of it, an action of trespass will lie, I think the act done by the defendant in this case cannot be considered as a destruction of the wall, the removal of the old wall having been effected merely for the purpose of rebuilding another on its site as speedily as possible.' Then Mr. Justice Littledale says (6) : "If two persons be tenants-in-common of land on which there is a wall, and one refuses to repair and the other pulls down the wall and sells the materials and builds a better wall, it may be said that there has been a total destruction of the original wall, more especially if he sold the materials. Still, if he did that for the purpose of getting other materials to make the new wall better than the old one was, and he builds the new one, though there was a destruction of that which was originally the subject-matter of the tenancy-in-common, an action of trespass will not be maintainable;' and then he says if it is partial damage you must have an action on the case.

"The result, therefore, is this: that what the defendant is doing, namely, the removing of the foundation of the old wall, be it for the purpose of putting in as good a foundation or better one,—for he is doing it, as it is stated, by beautiful concrete—it is not a destruction by a tenant-in-common. All that has been done has been done in this case with the *bonâ fide* intention of sup-

(1) (1828) 8 B. & C. 257.
(2) (1878) 9 Ch. D. 68.
(3) (1828) 8 B. & C. 257.
(1828) 8 B. & C. at p. 265.
(5) (1828) Ibid at p. 267.
(6) (1828) Ibid at p. 270.

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porting the wall, and will not entitle the other tenant-in-common to maintain an action, of course still less an injunction. I am not now speaking of a case of danger, which is not, as I understand, the case here. That being so, it appears to me that at common law there would have been no right of action as far as the wall is concerned."

Therefore this appeal, No. 261 of 1900, must be allowed and the decree of the lower Court reversed. The result is that this suit will be dismissed with costs throughout. As the defendant has offered to abide by any terms that may be imposed with a view to insuring that the drain shall not be a nuisance, the following undertaking by him will be embodied in the decree:—There must be an undertaking on the part of Mohanchand to construct and use the drain so as not to create a nuisance, and there will be a reference to the lower Court to determine the character, material, level and slope of the drain, and its course and outlet, and generally so as to secure the above object. Liberty to apply to this Court if necessary.

Appeal No. 262 follows the result of the former: the decrees of the lower Court will be reversed and the injunction awarded. The respondent must pay the costs throughout.

*Decrees reversed.*

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## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.*

1900. *September* 18.

TUKARAM AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* ANANTBHAT (ORIGINAL PLAINTIFF), RESPONDENT.*

*Civil Procedure Code (Act XIV of 1882), sec. 257A—Decree—Mortgage—Amount of decree included in the mortgage—Agreement to give time—Satisfaction.*

The agreement to which the first paragraph of section 257A of the Civil Procedure Code (Act XIV of 1882) relates is one which suspends and does not destroy the rights of execution consequent on a decree.

Where a mortgage-bond was given for an amount which included a sum due under a decree, and made the whole amount payable in instalments, it was con-

* Second Appeal, No. 300 of 1900.

tended, under section 257A of the Civil Procedure Code (Act XIV of 1882), that the bond was void to the extent of the sum due under the decree, being an agreement to give time for the satisfaction of a judgment-debt, and that in respect of that sum no suit would lie.

*Held*, that the suit was maintainable. The mortgage-bond did not suspend the right to execute the decree, but it put an end to the remedy on the decree and substituted the mortgage-bond. It was the actual and present satisfaction of the judgment, and therefore was not an agreement to give time for the satisfaction of a judgment-debt and did not fall within section 257A of the Civil Procedure Code.

SECOND appeal from the decision of R. Knight, District Judge of Sátára, modifying the decree of Ráo Sáheb B. Y. Gupte, Subordinate Judge of Wái.

The plaintiff sued to recover a mortgage-debt of Rs. 500 and interest from the defendants.

The following is the material portion of the mortgage-bond :—

"Bond dated the 27th August, 1894 (11th Shráwan Vadya, Shake 1816), for Rs. 500 is passed by the debtor Tukaram and surety Lakshman valad Govinda, to the following effect :—I have borrowed Rs. 450 from you to pay my creditors and for domestic expenses. The rate of interest is 12 annas per cent. per month till repayment. The time for repayment is the end of Margashirsha of the current year. In addition to the abovenamed sum I have borrowed from you Rs. 50, in all Rs. 500. The rate of interest is 12 annas per cent. per month till repayment. The time for repayment is the end of this Margashirsha. I shall repay Rs. 100 and interest on the whole sum then. Afterwards from Shake 1817 to Shake 1824 for eight years I shall pay every year by the end of Margashirsha Rs. 50 out of the principal, together with interest on the whole. I shall thus satisfy your whole claim with interest by punctual payments every year. In case of default in any year, you should wait till there is a second default on my part. If I fail to pay the sum due on account of the two overdue instalments with interest, I shall not plead the time which is yet to run and pay the whole sum due to you at once. I shall take receipt for the same on the bond &c. &c."

The defendants admitted the execution of the mortgage, but pleaded that of the Rs. 500 stated to be the consideration for the mortgage Rs. 308 was a sum due by defendants Nos. 1 and 2 to the plaintiff under a decree obtained by him against them in suit No. 153 of 1893, and that the mortgage was therefore an adjustment of that decree, and not having been sanctioned or certified to the Court was void to the extent of the judgment-debt.

The Subordinate Judge relying on the decision of the Full

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Bench in *Heera Nema* v. *Pestonji*[1] found that the mortgage-bond sued on was void to the extent of the judgment-debt, namely Rs. 308, inasmuch as the satisfaction of the decree had neither been duly certified to the Court nor had sanction been obtained under section 257A of the Civil Procedure Code (Act XIV of 1882). He therefore passed a decree directing the defendants to pay to the plaintiff only Rs. 114-15-9 with interest within six months from the date of the decree.

On appeal by the plaintiff the Judge held the bond to be valid, because, although it had the effect of giving time to discharge the judgment-debt, it was not an agreement to give time and it did not provide for the payment of any sum in excess of that due under the decree. He therefore modified the decree of the Subordinate Judge by adding to the sum found payable to the plaintiff by defendants Rs. 308 together with interest at 9 per cent. from the date of the bond to the date of the suit.

Defendants preferred a second appeal.

*Mahadev V. Bhat* for the appellants (defendants):—The terms of the bond clearly show that it gives time for the satisfaction of the judgment-debt. In consideration of the decree-holder getting a substantial security for the debt due under the decree, he by the bond allowed the judgment-debtors to pay off by instalments the debt which was payable at once. The bond provides that the first instalment of one hundred rupees shall be paid six months after date and that the balance shall be paid by annual instalments of fifty rupees each in eight years. Thus the debtor gets time for eight years and the decree-holder gets the security of land. This was a private arrangement not sanctioned by the Court. The object of section 257A of the Civil Procedure Code was to protect the judgment-debtor from undue influence—*Kesu* v. *Genu*,[2] or to afford protection to the parties against unfair arrangements and to avoid inconvenience and delay in the execution of decrees—*Hukum Chund* v. *Taharunnessa Bibi*.[3] The mortgage-bond here frustrates the object of the section. The current of authorities in this Presidency is different from that

(1) (1898) 22 Bom. 693. (2) (1898) 23 Bom. 502.
(3) (1889) 16 Cal. 504.

of the other Presidencies. This Court has consistently held that section 257A does not relate exclusively to agreements to extend time for enforcing the decree, but is applicable to all agreements —*Swamirav* v. *Kashinath*(1); *Madhavrav* v. *Chilu*(2); *Pandurang* v. *Narayan*(3); *Ganesh* v. *Abdullabeg*(4); *Davlatsing* v. *Pandu*(5); *Bank of Bengal* v. *Vyabhoy*(6); *Jhabar Mahomed* v. *Modan Sonahar* (7); *Krishna* v. *Vasudev*(8); *Vishnu* v. *Hur Patel*(9); and *Heera Nema* v. *Pestonji*.(10)

*Purushottam P. Khare* for the respondent (plaintiff):—The mortgage-bond is not an agreement to give time to the judgment-debtor. It is in full satisfaction of the judgment-debt and in fact extinguishes that debt. A suit will lie to enforce such a contract—*Narayan* v. *Baba*.(11)

The Full Bench ruling in *Heera Nema* v. *Pestonji* (12) did not touch the present point, as the agreement in that case contained a stipulation to make payments in excess of the amount allowed by the decree. The rulings of the other High Courts support our contention.

The jural relation created by the decree is put an end to by the mortgage-bond. It cannot be said of such a bond that it is an agreement to give time. No sanction of the Court was therefore necessary.

JENKINS, C.J.:—On the 27th of August, 1894, the three defendants executed in the plaintiff's favour a mortgage-bond for Rs. 500. Of this amount Rs. 308 was due from the first and second defendants to the plaintiff under a decree, and the sole point for our determination is whether this sum is recoverable in this suit. The Subordinate Judge of Wái has held that it cannot be recovered; but this decision was reversed on appeal by the District Judge of Sátára. It is from this decree that the present appeal has been preferred.

(1) (1890) 15 Bom. 419.
(2) (1881) P. J. 315.
(3) (1884) 8 Bom. 300.
(4) (1884) 8 Bom. 538.
(5) (1884) 9 Bom. 176.
(6) (1891) 16 Bom. 618.
(7) (1885) 11 Cal. 671.
(8) (1896) 21 Bom. 808.
(9) (1888) 12 Bom. 499.
(10) (1898) 22 Bom. 693.
(11) (1883) P. J. 340.
(12) (1898) 22 Bom. 692.

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The solution of the question depends on section 257A of the Civil Procedure Code, which is in these terms:—

"Every agreement to give time for the satisfaction of a judgment-debt shall be void unless it is made for consideration and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable.

"Every agreement for the satisfaction of a judgment-debt which provides for the payment, directly or indirectly, of any sum in excess of the sum due or to accrue due under the decree, shall be void unless it is made with the like sanction.

"Any sum paid in contravention of the provisions of this section shall be applied to the satisfaction of the judgment-debt, and the surplus, if any, shall be recoverable by the judgment-debtor."

It is not suggested that the case falls within the second paragraph of the section; what is urged is, that in respect of the Rs. 308 there is an agreement to give time for the satisfaction of a judgment-debt. It becomes necessary, therefore, to examine the mortgage-bond, so as to learn its precise force. It is in these terms:—

"Bond dated the 27th August, 1894 (11th of Shrâwan Vadya, Shake 1816) for Rs. 500 is passed by the debtor Tukaram and surety Lakshman valad Govinda to the following effect:—I have borrowed Rs. 450 from you to pay my creditors and for domestic expenses. The rate of interest is 12 annas per cent. per month till repayment. The time for repayment is the end of Margashirsha of the current year. In addition to the abovenamed sum I have borrowed from you Rs. 50, in all Rs. 500. The rate of interest is 12 annas per cent. per month till repayment. The time for repayment is the end of this Margashirsha. I shall repay Rs. 100 and interest on the whole sum then. Afterwards from Shake 1817 to Shake 1824 for eight years I shall pay every year by the end of Margashirsha Rs. 50 out of the principal, together with interest on the whole. I shall thus satisfy your whole claim with interest by punctual payments every year. In case of default in any year, you should wait till there is a second default on my part. If I fail to pay the sum due on account of the two overdue instalments with interest, I shall not plead the time which is yet to run and pay the whole sum due to you at once. I shall take receipt for the same on the bond &c. &c."

Now from a perusal of this document it appears to us clear, that according to its true construction it does not purport to suspend temporarily the right to execute the decree, but to put an end to the remedy on the decree, and to replace it with the

mortgage-bond. Can it then be said that this is an agreement to give time for the satisfaction of the judgment-debt? If we look to the Code alone, we should say clearly not; the mortgage-bond is itself the actual and present satisfaction of the judgment, and if this be so, it necessarily follows it is not an agreement to give time for the satisfaction of a judgment, for such an agreement *ex vi termini* implies that there has been no actual satisfaction, but merely a stipulation for a future satisfaction. In other words the agreement, to which the first para. of section 257A relates, is one which suspends and does not destroy the rights of execution consequent on the decree.

But then it is said that the cases forbid our placing such a construction on the words of the section; we will therefore examine them to see whether such is their effect. The first case to which we will refer is that of *Madhavrav Anant* v. *Chilu*, not to be found in the authorized reports, but only in the Printed Judgments for 1881 at p. 315. For this reason, and also because it is the foundation on which the whole structure of the case law in this Presidency is built, we refer to the case at length. The judgment is as follows:—

"This is not a suit upon a decree or for execution thereof, but upon a new contract whereby the debtor was bound to pay interest on moneys, the greater part, but not the whole, of which consisted of the amount of a decree, and the creditor, instead of being entitled to immediate execution of his decree, was debarred from taking any proceedings in that respect during the currency of the bond, which was dated 4th Bhadrava Vad, Shake 1799, and was not payable until the end of Phalgun in the same year, *i.e.* the plaintiff by taking the bond contracted, in consideration of certain interest, to forbear for a period exceeding six months by some days. Such a contract was valid until section 257(*a*) of the present Civil Procedure Code was passed. It is not retrospective, and is therefore not applicable to this case. It is new legislation and not contained within section 2 of Act XXIII of 1861."

Clearly then this case is not decisive of the present.

The next case is *Pandurang* v. *Narayan*,[1] and there no doubt, as here, there was an agreement that the judgment-debtor should execute to the judgment-creditor a bond in satisfaction of the judgment-debt. The compromise or adjustment of the decree

(1) (1884) 8 Bom 300.

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was not certified to the Court, and when a suit was subsequently brought on it, the High Court held, in affirmation of the Subordinate Judge's decree, that the adjustment of the decree not having been certified to the Court, was not binding on the plaintiff, and therefore constituted no valid consideration. This case, however, though it bears a close resemblance to the present, is absolutely no authority. It was decided prior to the enactment of the last clause of section 258 in its present form, and at a time when the doctrine of this Court was that the section was not, as it now indisputably is, confined in its operation to proceedings in execution. The decision, in truth, rested not on section 257A, but on this view of section 258 in its old shape. The inapplicability of *Ganesh* v. *Abdullabeg* at page 538 of the same volume is manifest; because it was held that the agreement was void under the second clause of section 257A of the Code of Civil Procedure; whereas *ex concessis* that clause does not apply here. It is in this case that *Madhavrav* v. *Chilu* makes its first appearance in the authorized reports.

*Davlatsing* v. *Pandu*[1] was the next case cited, but is distinguishable, as the vice of the agreement was that it provided for the payment of interest not allowed by the decree, so that it clearly fell under the second clause. *Bank of Bengal* v. *Vyabhoy*[2] turned on the fact that there was a specific agreement "to postpone the execution of the decree," and liberty was reserved to the Bank in default "to forthwith execute the said decree." The decree was suspended, not satisfied, and as a consequence the case clearly fell within the exact terms of the section.

The case on which perhaps the greatest stress was laid in the argument before us is *Swamirao* v. *Kashinath*,[3] not so much for what it decides as for what it suggests. The following question was, under section 617 of the Code of Civil Procedure, submitted for the decision of the High Court:—"Whether under the present state of the law a suit based on a private agreement made out of Court in satisfaction or adjustment of a decree without the sanction of the Court which made the decree should be admitted?" Sir Charles Sargent, C.J., in delivering judgment, said:—

(1) (1884) 9 Bom. 176.

(2) (1891) 16 Bom. 613.

(3) (1890) 15 Bom. 419.

"With respect to section 257A, the concluding clause of section 258 as amended has no direct bearing on it, as it relates to a different subject-matter; and the question still remains whether section 257A relates exclusively to agreements to extend the time for enforcing decree by execution, as ruled by the Calcutta High Court in *Jhabar Mahomed* v. *Modan Sonahar*,(1) or is applicable to all agreements according to the view taken by Westropp, C.J., and Kemball, J., in *Madhavrav Anant* v. *Chilu*,(2) and which was followed in *Ganesh Shivram* v. *Abdullabeg*,(3) *Pandurang Ramchandra* v. *Narayan*,(4) and *Davlatsing* v. *Pandu*.(5) The Subordinate Judge should follow the rulings of this Court."

Now it is to be noticed that the Court had not the benefit of an argument before it, and but for this it is impossible to suppose that those circumstances which served to differentiate *Madhavrao's* case and the other cited authorities would not have been brought to the attention of the Court. But, however that may be, it is clear that the learned Judges did not intend to go beyond the cited cases, and, as we have already shown, none of them are on all fours with the present.

The next case that calls for notice is *Krishna* v. *Vasudev*,(6) the actual decision in which is not an authority in favour of the appellants, for it was held that the requirements of section 257A had been satisfied. Sir Charles Farran, C.J., however, at page 819 says:—

"It remains to consider the objections to the mortgages founded upon the provisions of section 257A of the Civil Procedure Code, which are common to both appeals. The adjustment of the decree by the bonds having been certified to the Court, no difficulty arises on that score, nor could any arise since the alteration in the wording of section 258 of the Civil Procedure Code—*Swamirao* v. *Kashinath*.(7) The provisions of section 257A occasion some difficulty. A long series of decisions in this Court has interpreted the section as applicable to agreements which operate to extinguish the original decree. They are all (except *Vishnu* v. *Hur Patel* (8)) mentioned in *Swamirao* v. *Kashinath* (*supra*) and are not dissented from in *Bank of Bengal* v. *Vyabhoy Gangji*,(9) though in the former of these cases Sargent, C.J., speaks somewhat hesitatingly as to their binding force since the Legislature has declared its purpose by the alteration made in the 258th section of the Civil Procedure Code. The Calcutta High Court, on the other hand, in *Jhabar Mahomed* v. *Modan Sonahar*,(10)

(1) (1885) 11 Cal. 671.
(2) (1881) P. J. 315.
(3) (1884) 8 Bom. 538.
(4) (1884) 8 Bom. 300.
(5) (1884) 9 Bom. 176.
(6) (1896) 21 Bom. 808.
(7) (1890) 15 Bom. 419.
(8) (1888) 12 Bom. 499.
(9) (1891) 16 Bom. 618.
(10) (1885) 11 Cal. 671.

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after a consideration of the Bombay authorities, has, agreeing with the Allahabad High Court, held that the provisions of section 257A are only intended to prevent any binding agreement between judgment-debtors and judgment-creditors for extending the time for enforcing decrees by execution without consideration and without the sanction of the Court, a ruling which would equally apply to agreements falling within the 2nd clause of the section and which has been so applied in *Hukum Chand* v. *Taharunnessa Bibi*.(1) These rulings have been followed in the Madras High Court—*Sellumayyan* v. *Muthan*(2) and *Juji* v. *Annai*.(3) There is thus a consensus of opinion in all the other High Courts that the Legislature in framing the Code of Civil Procedure did not intend to effect, and did not, therefore, effect any change in the substantive law relating to the consideration for agreements, an opinion which by the alteration of section 258 the Legislature would seem to countenance. When it again comes before this Court it may be proper to refer it for consideration to a Full Bench. The question is of the highest importance, and it is one upon which it is desirable that there should be uniformity in the law."

No doubt it is said that "a long series of decisions has interpreted the section as applicable to agreements which operate to extinguish the original decree:" this, however, was, in the view their Lordships took, an expression of opinion not necessary for the decision of the case, and we have shown that the authorities (other than *Vishnu* v. *Hur Patel* (4) to which we will later refer) do not support the proposition.

Another case pressed on us was *Herra Nema* v. *Pestonji*,(5) heard by a Full Bench of the Court. It is important to observe what precisely were the questions to which the attention of the Court was directed, and what were the facts under which they arose. A suit had been brought in the Small Cause Court on a promissory note, which was given together with certain cash payments in settlement of a decree. The decree was satisfied and handed over to the defendants, but the compromise was not sanctioned by the Court. The promissory note carried interest at 3 per cent. per mensem. The Chief Judge of the Small Cause Court feeling doubts as to the law referred the following questions to this Court:—I. Whether the promissory note falls within the provision of section 257A of the Code of Civil Procedure? II. If it does, whether it is void and unenforceable by

(1) (1889) 16 Cal. 501.
(2) (1888) 12 Mad. 61.
(3) (1893) 17 Mad. 382.
(4) (1888) 12 Bom. 499.
(5) (1898) 22 Bom. 693.

reason of the provisions of the section? Now we imagine there could be no doubt as to the answer to these questions. The agreement for the satisfaction of the judgment-debt in imposing a liability to pay 3 per cent. per mensem, or 36 per cent. per annum, clearly provided for the payment of a sum in excess of the sum to accrue due under the decree, and so we find Sir Charles Farran says: "In this view it is unnecessary to consider the argument of Mr. Scott that the agreement was also an agreement to give time for the satisfaction of the judgment-debt." In fact it is conceded that there is nothing to be found in Sir Charles Farran's judgment to support the present appellants, but reliance is placed on what are said to be certain *obiter dicta* in the judgment of Mr. Justice Candy. We think an effect is sought to be extracted from the learned Judge's remarks beyond the scope of his intentions.

We have now dealt with all the cited cases, and it only remains for us to consider *Vishnu* v. *Hur Patel* [1] which demands close examination, as it bears a resemblance, but only superficial we think, to the present. A money-decree was passed, and in execution of it property was attached. A havala was given by five persons other than the defendant, this havala being an oral undertaking to pay the amount of the decree. The exact form of the havala does not appear, but from the first question framed by the District Judge, obviously with great care and precision, it appears that the havala did not supersede the decree, which still remained enforceable. Subsequently the defendant and two others executed a bond to the plaintiff, reciting the havala and the payment thereunder, and agreeing to pay the amount of the decree with interest. On these facts the District Judge submitted the points set out at page 500 of the report, which merit close attention. The decision of this Court was pronounced by Nanabhai Haridas, J., who held (i) that the havala was void by reason of para. 1 of section 257A; (ii) that, therefore, there was no consideration for the bond; and (iii) that if the bond was an agreement for satisfaction of the decree, it was void under para. 2 of section 257A.

(1) (1888) 12 Bom. 499.

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With the 3rd of these grounds we have, for reasons we have already indicated, no concern. So that we limit ourselves to an examination of the 1st and 2nd grounds, which in fact are one branch of the *ratio decidendi*.

Now it is to be noted on what ground it was that the learned Judges held that the bond—and it was as to that alone they were consulted—was void. It was not because the bond offended the provisions of para. 1 of section 257A, but because the havala, which was its consideration, was in contravention of them. But, as we have already pointed out, the havala did not supersede the decree: therefore an opinion expressed as to its void quality throws no light on the present case, where, as we have already held, we are concerned with a bond which according to its construction was a satisfaction of the decree. We are not concerned to consider how far the Court was right in holding that the havala, to which the defendant was not a party, was void: suffice it that the learned Judges did so hold, and as a result decided that there was no consideration for the bond.

We have now dealt with all the cases, and none of them appear to us to govern this case. We at one time were in doubt as to whether it could be said there was no consideration for the bond, inasmuch as it was not certified under section 258, but we think there is no sound foundation for this doubt. In the first place it overlooks the change in the last clause in the section, and in the next place it would be contrary to the fact to hold that there was no consideration. We therefore think that the District Judge was right, so that his decree must be confirmed and this appeal dismissed with costs.

*Decree confirmed.*

# APPELLATE CIVIL.

*Before Mr. Justice Fulton and Mr. Justice Batty.*

BAI PARVATI (ORIGINAL PLAINTIFF), APPELLANT, *v.* TARWADI DOLATRAM (ORIGINAL DEFENDANT), RESPONDENT.* 1900. *September* 13.

*Hindu law—Maintenance—Daughter-in-law—Her claim to maintenance against self-acquired property devised by her father-in-law.*

The widow of a predeceased unseparated son has no right to maintenance from a person to whom her father-in-law has bequeathed the whole of his self-acquired property.

*Yamunabai* v. *Manubai*(1) referred to and distinguished.

SECOND appeal from the decision of Ráo Bahádur Chunilal D. Kavishvar, Additional First Class Subordinate Judge, A.P., of Ahmedabad, reversing the decree of Ráo Sáheb Karpurram M., Additional Joint Subordinate Judge at Ahmedabad.

Suit for maintenance by a Hindu widow.

One Ishwar Vithal died on 30th July, 1895, possessed of self-acquired property. He left him surviving a daughter-in-law, Bai Parvati, the widow of a predeceased son.

By his will dated the 6th July, 1895, Ishwar bequeathed the whole of his property to his nephew Dolatram Motiram (the defendant).

In 1898 Bai Parvati brought this suit against the defendant claiming maintenance at Rs. 8 a month and also Rs. 168 as arrears of maintenance from 19th October, 1895, to 19th July, 1897. She also prayed that a house should be given to her for residence.

Defendant pleaded (*inter alia*) that Ishwar, the plaintiff's father-in-law, had left no ancestral property; that under his will defendant took an absolute interest in the whole of the property left by him; and that the plaintiff had no right, as against him, to any provision for maintenance and residence.

The Subordinate Judge passed a decree directing the defendant

* Second Appeal, No. 309 of 1900.

(1) (1899) 23 Bom. 608.

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to pay to the plaintiff Rs. 48 per year for maintenance and Rs. 84 as arrears, and to give possession of a house for her residence.

The following is an extract from his judgment :—

The main question is whether the plaintiff is entitled to any maintenance, and if so, at what rate. According to the current of decisions of all the High Courts, a father-in-law has only a moral and not a legal obligation to maintain his widowed daughter-in-law during his lifetime out of his self-acquired property. This moral obligation becomes a legal obligation after his death by reason of self-acquired property going by inheritance into the hands of his son or heir (see *Adibai* v. *Kasandas*, I. L. R. 11 Bom. 119; *Janki* v. *Nandram*, I. L. R. 11 All. 194; and *Deviprasad* v. *Gunvanti Koor*, I. L. R. 22 Cal. 410). The Madras High Court differs on this point (see I. L. R. 11 Mad. 91). It held that a daughter-in-law could not enforce a claim for maintenance against the self-acquired property of her father-in-law, which had passed to his grandson, unless the father-in-law showed by conduct or otherwise an unequivocal intention that it should be taken subject to the obligation of providing for her support. As the other three High Courts are unanimous on this point I am bound to follow the ruling of the Bombay High Court. But the circumstances in all these cases are distinguishable from those of the present case in one important point. It is this, that while in the present case the father-in-law died having made a will in favour of the defendant, the father-in-law in those cases died intestate. The question therefore arises, whether a devisee is under a legal obligation to maintain a widow whom the testator was morally and not legally bound to support. If a husband makes a gift of his entire estate without reserving maintenance to his widow, the donee takes subject to the liability to maintain her (see *Jamna* v. *Machul*, 2 All. 315, and *Narbadabai* v. *Mahadev*, I. L. R. 5 Bom. 99). The same principle applies to a devisee (see Mayne's Hindu Law, 5th Edition, 552). As a husband is under a legal obligation to make a provision for his widow after his death, a father-in-law is under a moral obligation to make a provision out of his self-acquired property for the maintenance of his widowed daughter. It is a settled principle of law that a devisee or a donee of the entire property of a testator or donor is liable to pay all the debts due by the testator or the donor. This liability, in my opinion, extends not only to legal debts, but also to moral obligations. For all Hindu texts maintenance by a man of his dependants is a primary duty and the principles which convert the moral obligations into legal obligations when the property descends by inheritance hold good also when it is devised under a will. In the Allahabad case mentioned above, Mr. Justice Mahamood is reported to have observed on page 214: "I think I may safely say here that in this text, as also in similar original texts of the Hindu law, the word 'debt' is to be understood in a broad sense so as to include all classes of obligations, such as moral obligations in respect of maintaining widowed daughters-in-law and expenses of the marriage of unmarried daughters." For all these reasons I hold that the plaintiff is entitled to the maintenance. Looking to the caste of the parties and taking the amount of the

property left by the deceased into consideration, I think Rs. 48 a year would be a reasonable and sufficient amount. She is also entitled to a residence and Rs. 84 as arrears.

This decision was reversed, on appeal, by the Additional First Class Subordinate Judge, A. P., who dismissed the suit. He held that there having been no ancestral property in the hands of Ishwar, the plaintiff's father-in-law, he was not legally bound to maintain the plaintiff and that under his will the defendant took his property absolutely free from all liability to provide maintenance or residence for the plaintiff.

Against this decision plaintiff preferred a second appeal to the High Court.

*L. A. Shah* for appellant (plaintiff).

*G. S. Rao* for respondent (defendant).

BATTY, J.:—The plaintiff in this case is a widow. Her husband, Motiram, died in the lifetime of his father, Ishwar Vithal, who bequeathed all his property to his nephew the defendant. None of the property is shown to have been the ancestral property of the deceased, and the will is not disputed. The plaintiff seeks in this suit to recover maintenance from the defendant, the devisee of her father-in-law. The Court of first instance declared plaintiff entitled to maintenance at the rate of Rs. 4 per mensem and to Rs. 84 as arrears, and also declared her right to a house for residence. The lower Appellate Court, however, reversed this decision of the Court of first instance and rejected the claim, holding that the widow would not have been entitled to claim maintenance from the self-acquired property of her father-in-law during the lifetime of her father-in-law, and that whatever moral obligation there might have been on the father-in-law to afford such maintenance, or whatever legal obligation might from that moral obligation have devolved on the heir of the father-in-law, the defendant having acquired not as heir, but as devisee under a will, from the father-in-law, was under no obligation whatever to maintain the plaintiff, no condition requiring him to maintain the plaintiff having been imposed on him either by the will or otherwise.

It has been contended for the plaintiff in this appeal that the

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principle on which the moral obligation of the father-in-law to afford maintenance is converted into a legal obligation binding on the heir on the devolution to him of the estate, cannot be shown on any reasonable or consistent grounds to have less force in a case where the estate of the father-in-law has passed by devise instead of devolving on an heir, and special stress has been laid upon the remarks of Mr. Justice Ranade in the case of *Yamunabai* v. *Manubai*,[1] and upon the decision of the Madras High Court in *Rangammal* v. *Echammal*.[2] The grounds of decision in the first mentioned of these two cases—*Yamunabai* v. *Manubai*—however hardly go to support the appellant's contention. That judgment points out that the spiritual benefit of the deceased owner, which the Allahabad High Court regards as the ground on which the moral obligation in the deceased is intensified into legal obligation in the heir, and the legal obligation on the heir to provide out of ancestral property for those whom his ancestors were bound morally or legally to maintain, which the Calcutta High Court regards as the ground of the heir's liability in such cases, both lead, though by divergent routes, to the same conclusion, *viz.* that the spiritual benefit of the deceased entails on the heir a special obligation when he takes the estate. And the judgment further proceeds to indicate that it is not the fact of the property being *ancestral*, but of its having been *inherited* from a source on which the widow's husband had an unextinguished claim, that renders that property liable for the widow's maintenance. Thus, the reasoning throughout the judgment seems specially to emphasize the importance of the mode of devolution by *inheritance* in determining the liability of the new holder, and it is specially observed that in the case of property self-acquired by the deceased owner, if the heir had been a testamentary devisee, the incidents of self-acquisition would protect the property even in his hands. Towards the conclusion of the judgment it is true that the liability of a father-in-law to support even from his self-acquired property the widow of a son not separated from him in interest, is said to be founded on texts which have in such cases mandatory and not merely "preceptive" force. And it is urged as a corollary from these remarks that

(1) (1899) 23 Bom. 608, and see specially p. 613. (2) (1898) 22 Mad. 305.

the person claiming from a father-in-law who was under the obligation arising from such mandatory texts, would also be under a legal obligation to maintain the widow of an unseparated son of the testator. But it is to be observed, in the first place, that the assertion of a legal obligation operating from the mandatory force of such texts, on the self-acquired estate of an unseparated father-in-law, was by no means necessary for the decision of the case in *Yamunabai* v. *Manubai*, in which the passage referred to occurs; and in the second place the dictum, if it were intended as more than a statement of recognised spiritual obligation, would be distinctly in conflict with the law as laid down in the Full Bench decision in *Savitribai* v. *Luxmibai*,(1) where it was held that the widow is *not* entitled to maintenance from her husband's relatives, whether they were separated or unseparated from him at the time of his death, if they have not any ancestral estate or estate belonging to him in their hands—*Savitribai* v. *Luxmibai*.(2) And thirdly it is to be noted that even supposing such texts to have such mandatory force as to operate upon the self-acquired property of a separated father-in-law, yet the principles recognised at an earlier part of the judgment in *Yamunabai* v. *Manubai* (3) would suffice to show that in the hands of the testamentary devisee, the incidents of self-acquisition would protect such property even in his hands.

To accept the position that the widow of an unseparated son could claim maintenance as a legal right from the self-acquired property of her father-in-law while it was still in his hands, would be to revert to the doctrine enunciated in cases distinctly overruled by the Full Bench decision in *Savitribai* v. *Luxmibai* —and this we are not at liberty to do. And if there is no such legal obligation on the father-in-law in such circumstances, there is no authority whatever for the position that a testamentary disposition of such property by the father-in-law, in exercise of his "unrestricted power of disposing of it by gift or devising it by will," would attach to it any legal obligation in the hands of the devisee any more than a gift thereof *inter vivos* would attach thereto such legal obligation in the hands of the donee. The

(1) (1878) 2 Bom. 573. (2) (1888) 2 Bom. 620 *et seq.*

(3) (1899) 23 Bom. at p. 611.

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ripening of the moral obligation into a legal obligation on devolution by inheritance is due to the operation of principles peculiar to the doctrines of Hindu law which regards as *quasi* trustee for the family, and for the spiritual benefit of the deceased owner, a member into whose hands property comes by virtue of his status as a member of the family. But property acquired by valid testamentary disposition is not governed by the rules of the Hindu law of inheritance, and when the power of making such disposition is unrestricted, it is difficult to conceive any consistent ground on which the devisee could be held bound by an obligation from which the testator had power to relieve him and by the bequest had actually relieved him. In the case of *Rangammal* v. *Echammal*,[1] the remarks relied on for the appellant in the present case appear to be mere *obiter dicta*—suggestions thrown out on which the judgment distinctly stated it was not necessary to found the decision. It does not appear to be necessary in the present case to consider the history of the doctrine at present accepted in this Court and recapitulated in the judgment in *Yamunabai* v. *Manubai*—as it seems clear that the propositions contained in that case afford a sufficient answer to the argument offered on behalf of the appellant.

The decree of the lower Appellate Court is therefore confirmed and the appeal is rejected with costs. The plaintiff is to pay the Court fees throughout, which would have been paid by her if she had not been permitted to sue and appeal as a pauper.

*Decree confirmed.*

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[1] (1898) 22 Mad. 305.

# APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

TAYAWA (ORIGINAL PLAINTIFF), APPELLANT, *v.* GURSHIDAPPA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1900. *September* 26

*Landlord and tenant—Lease—Ouster of tenant by paramount owner—Claim by tenant against his lessor for compensation for such ouster—Covenant for quiet enjoyment—Damages—Measure of damages—Transfer of Property Act (IV of 1882), sec. 108, cl. (c).*

The words "without interruption" in section 108, clause (*c*), of the Transfer of Property Act (IV of 1882) give a lessee in India the same rights as he would have under what is known in England as a covenant for quiet enjoyment in an unqualified form. In other words, the lessee is protected against interruption by whomsoever it is occasioned.

Where the interruption is caused by the paramount owner of the property, and not by a stranger, the lessor is bound to remove the interruption, and if he fails to do so, he must indemnify the lessee.

A held land under a lease granted by B for eleven years. B had no title to the land, which really belonged to C. In 1895 C dispossessed A.

*Held*, that under clause (*c*) of section 108 of the Transfer of Property Act (IV of 1882) A was entitled to recover compensation from B.

SECOND appeal from the decision of Ráo Bahádur Raghavendra Ramchandra Gangolli, Additional First Class Subordinate Judge, A.P., at Bijápur, varying the decree of Ráo Sáheb H. V. Chinmulgund, Second Class Subordinate Judge of Muddebihál.

Suit by a lessee to recover possession of land held by her under a lease from defendant No. 1 and of which she had been dispossessed by defendant No. 3, the paramount owner, and for mesne profits from defendant No. 1 and compensation for such dispossession.

One Kadir Padsha (defendant No. 3), who was the owner of the land in question, mortgaged it in 1868 with possession to Kassim Saheb (defendant No. 2) for twenty-two years (*i. e.* up to 1890).

In 1879 Kassim Saheb (defendant No. 2), the mortgagee, leased it to the husband of the plaintiff Tayawa for twenty-five years (*i. e.* up to 1904).

In 1892, although his mortgage term had expired in 1890,

* Second Appeal, No. 485 of 1899.

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Kassim Saheb (defendant No. 2) sold the land to Gurshidappa (defendant No. 1), who in the following year (1893) leased it to the plaintiff for eleven years, *i.e.* the unexpired portion of the term of twenty-five years for which it had been leased, as above stated, by Kassim Saheb (defendant No. 2) to the plaintiff's husband.

Meanwhile, in 1892, Kadir Padsha (defendant No. 3) had filed a suit for partition against Kassim Saheb (defendant No. 2) and obtained a decree against him, in execution of which he dispossessed the plaintiff in 1895.

Thereupon the plaintiff brought this suit against her lessor, Gurshidappa (defendant No. 1), and Kassim Saheb (defendant No. 2) and Kadir Padsha (defendant No. 3), claiming to recover the land for the remaining period of her lease (ten years) and the profits for one year during which she had been dispossessed.

The first Court held that the plaintiff was not entitled to recover possession of the land, inasmuch as it belonged to Kadir Padsha (defendant No. 3), and the other defendants had no right to alienate it beyond the term of twenty-two years for which he had mortgaged it in 1868. The Court also ordered the first defendant Gurshidappa to pay the plaintiff one year's profit and also compensation at the same rate for nine years, *i. e.* the remaining period of the lease granted by him in 1893 to the plaintiff.

In appeal this last claim to compensation for nine years was held to be not maintainable, but the rest of the decree was confirmed.

The plaintiff appealed to the High Court.

*Krishnaji Hari Kelkar* for (plaintiff) appellant:—The question is whether section 108, clause (*c*), of the Transfer of Property Act implies an unqualified covenant for quiet enjoyment. Under the English law, the law does not imply an unqualified covenant. To protect against the paramount owner there must be an express covenant. Otherwise the lessee has no remedy against eviction by a paramount title-holder, but under the Transfer of Property Act the obligation of the lessor is wider than in England. The words 'without interruption' in clause (*c*) of section 108 are not limited in any way, and protects the lessee from disturbance even by the paramount owner—*Rasam* v.

*Douzette*.[1] The case is not covered by clause (*a*). There the ordinary care required on the part of the lessee is limited to the intended use of the property, and must be referred to the enjoyment and not to any defect in the title.

*N. V. Gokhale* for respondent No. 1 (defendant No. 1) :—The suit is only for possession, and this being so it cannot be converted into one for damages. Clause (*a*) of section 108 of the Transfer of Property Act clearly imposes an obligation on the lessee to find out all the defects in the title. The lessee in this case failed to do this and cannot now claim any relief.

RANADE, J. :—The principal question in respect of which the remand order of 22nd January, 1900, was made by us, has been decided by the lower Appellate Court, which found that no fraud or collusion was proved on the part of defendant No. 1 when he took the agreement (Exhibit 35) from the plaintiff in substitution of the previous agreement (Exhibit 53). It also found that in case plaintiff was held entitled to compensation, she should recover Rs. 442-8-0 from defendants Nos. 2 and 3. These defendants Nos. 2 and 3 have taken no objection to this finding. Mr. Kelkar, who appeared for plaintiff-appellant, also took no exception. He however raised the question that the appellant was entitled to claim damages for loss of possession from her lessor, respondent-defendant No. 1. Mr. Gokhale, who appeared for this respondent, contended that the appellant was not entitled to raise a new question not covered by the issues sent down in the remand order. Mr. Gokhale also contended, on the merits, that as the agreement of the lease did not contain any clause entitling plaintiff to claim compensation for loss of possession, the claim for damages was not maintainable.

In regard to the first objection we find, from the notes of arguments urged on both sides when the case was first argued before us, that this question of law was discussed along with the question of fraud. We thought at the time that if fraud were proved, it would not be necessary to consider the question about the right to claim damages. As fraud has not been proved, that question must now be considered. We overrule this objection.

[1] (1874) 23 Cal. W. R. 121.

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As regards the claim to damages, it appears to be established that the lands in dispute originally belonged to respondent-defendant No. 3. He mortgaged the same to defendant No. 2 for a period of twenty-two years, which term expired about 1890. While defendant No. 2 was in possession, he leased the land to plaintiff's husband in 1879 for a period of twenty-five years, *i. e.* for a much longer period than was covered by the mortgage. In 1892, after the mortgage for twenty-two years had expired, defendant No. 2 sold the land to defendant No. 1, and this defendant No. 1 in 1893 leased the land to the plaintiff for eleven years, which represented the unexpired portion of defendant No. 2's lease for twenty-five years. Defendant No. 3 on his part brought a partition suit in 1892 against defendant No. 2, and, in execution of the decree obtained by him, dispossessed the plaintiff in February, 1895. Thereupon the plaintiff, as lessee under defendant No. 1, brought her present suit against all the three defendants in 1895 to recover possession of the land for the term of ten years, of which she had been deprived of possession, and she also claimed profits for one year (1894-95).

The defendants denied their liability for different reasons. Defendant No. 1 contended that he had placed the plaintiff in possession and had not disturbed her. Defendant No. 2 said that he had sold the land to defendant No. 1 and had not obstructed plaintiff, and as defendant No. 3 had ousted the plaintiff, defendant No. 3 was responsible for the disturbance. Defendant No. 3 said that he was not bound by the alienation made by defendant No. 2 and the lease passed by defendant No. 1 as they had no right to deal with his land after the mortgage had expired, and plaintiff's remedy was against defendant No. 1 only for the loss sustained by her.

The Court of first instance held that plaintiff was not entitled to get possession of the land as it belonged to defendant No. 3, and the other defendants had no right to alienate the same beyond the period of the mortgage for twenty-two years. The claim for one year's profits, Rs. 98-4-0, was allowed against defendant No. 1, and he was also ordered to pay compensation to plaintiff at the same rate for nine years, during which period plaintiff was deprived of the benefit of the lease.

In appeal this last claim for compensation for nine years was held to be not maintainable, and defendant No. 1 was ordered to pay Rs. 98-4-0 only, and costs in proportion.

In second appeal, we deemed it necessary to send down an issue as to whether fraud or collusion was proved as against defendant No. 1, when he substituted the new lease for the old one of defendant No. 2. This has been found to be not the case, and the only question we have now to consider is whether, independently of fraud or collusion, defendant No. 1 was liable to make compensation to the plaintiff for the loss of profits sustained by her by reason of her being ousted by defendant No. 3 in his right of paramount owner of the land.

The decision of this question depends upon clause (*c*) section 108 of Act IV of 1882, which was introduced in 1893 in this Presidency. That clause provides "that the lessor should be deemed to contract with the lessee that, if the latter pays the rent reserved, he may hold the property during the time limited by the lease without interruption." These last words "without interruption" are not qualified in any way, and have been understood to mean what in England is known as a covenant for quiet enjoyment in an unqualified form. In other words, the lessee is protected against interruption by whomsoever it is occasioned. The qualified covenant in English leases protects the lessee against the lessor, or his heir or assigns, or any other person claiming by or under him or them; while when the covenant is unqualified, the lessee is protected against interruption from any person whomsoever.

In the present case the disturbance was made by the paramount owner of the land, who had mortgaged it to defendant No. 2 and the latter had sold it to defendant No. 1, and the defendant No. 1 had leased the land to the plaintiff for a longer term than was covered by the mortgage. Defendant No. 3 is not a person without lawful right, and is not a stranger against whose wrongful disturbance the lessee must protect herself.

Under the law as it stood before the Transfer of Property Act was passed, it was held that there was an implied contract that the lessor would give peaceable possession of the land leased, and that if the lessee were evicted by title paramount to

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that of the lessor, or by a person to whom he had given the land on lease, he is discharged from the payment of rent, and may claim proportionate reduction—*Munee Dutt Singh* v. *William Campbell* (1); *Kristo Soondur Sandyal* v. *Koomar Chunder Nath Roy* (2); *Gopanund Jha* v. *Lalla Gobind Pershad* (3); *Kadumbinee Dossia* v. *Kasheenath Biswas.* (4) In *Mrs. Benjamin Douzelle* v. *Girdharee Singh* (5) it was held that in the absence of express agreement to the contrary, a landlord is bound by an implied obligation to indemnify the tenant against disturbance by his own act or by the acts of those who claim under him, or by right paramount to him, but not against the wrongful acts of strangers.

This being the state of the law as it stood before Act IV of 1882 was passed, the unqualified words in section 108, clause (*c*), must be understood to have enlarged, and not narrowed the old law. The Indian Law Commissioners, who prepared the Bill which became Act IV of 1882, have stated in their report that they were of opinion that the lessor's contract for quiet enjoyment should be not limited to the acts of the lessor, or his heirs, or assigns, or those claiming under him; in other words, if the disturbance is made by the paramount owner of the property, and not by a stranger, the lessor is bound to remove the interruption, and if he fails to do so, he must indemnify the lessee. Mr. Gokhale for the respondent contended that the defect of title in this case was one which the lessee could with ordinary care have discovered, and therefore under clause (*a*), section 108, the lessee could claim no compensation from the lessor. It is in evidence, however, that the lessee-plaintiff in this case was an innocent woman, who had no notice of defendant No. 3's title, and though the latter gave notice to the other defendants, he gave no intimation of his objection to the plaintiff. The defect of title was one which defendant No. 2 did not admit. He claimed the right as a relation of defendant No. 3 to hold the land and alienate the same, independently of the mortgage, for the joint debts of himself and of defendant No. 3. He contested the point in both the lower Courts.

(1) (1869) 11 Cal. W. R. 278; 12 Cal. W. R. 149.
(2) (1871) 15 Cal. W. R. 230.
(3) (1869) 12 Cal. W. R. 109.
(4) (1870) 13 Cal. W. R. 338.
(5) (1874) 23 Cal. W. R. 121.

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Under the circumstances clause (*a*) does not apply. Clause (*c*) applies, and the plaintiff-appellant has a right to claim compensation from her lessor, defendant No. 1. The measure of that compensation has been fixed in the remand inquiry, and though no objection has been taken to it, we find that the lower Appellate Court has calculated the amount on a wrong principle which it calls capitalized value. It obviously means present value of future payments. The amount for nine years at the correct calculation would be Rs. 574-12-0, out of which we must deduct the two famine years. That would leave a balance of Rs. 378-4-0. Adding Rs. 98-4-0 for 1894-95, the total sum is Rs. 476-8-0. This sum may be recovered by the appellant from the respondent No. 1. The other respondents are clearly not responsible to the plaintiff.

We accordingly vary the decree of the Court below by substituting Rs. 476-8-0 in place of the sum awarded by it, together with costs to be paid by respondent No. 1 to plaintiff. The other respondents should bear their own costs.

*Decrees varied.*

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## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

GOPAL AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* KRISHNARAO AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1900. *October* 9.

*Limitation Act* (*XV of* 1877), *sch. II, arts. 136, 138 and 144—Symbolical possession—Auction-purchaser—Suit for possession from judgment-debtor—Limitation.*

Where an auction-purchaser at a court sale has obtained symbolical possession, he or his assigns may sue the judgment-debtor for actual possession within twelve years from the date of obtaining such symbolical possession. Article 144 of the Limitation Act (XV of 1877) applies.

Articles 136, 137 and 138 of schedule II of the Limitation Act (XV of 1877) refer to cases where no possession, formal or actual, has been obtained through the Court.

Article 136 applies to a private purchaser from a person not in possession.

* Second Appeal, No. 335 of 1900.

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Article 137 applies to an auction-purchaser of the rights of a person not in possession.

Article 138 applies when the actual purchase is made of the rights of a judgment-debtor, who is in possession at the date of the sale.

When an auction-purchaser or his assign has obtained formal possession, but is disturbed by the judgment-debtor or his heirs who have continued in actual possession, article 144 applies.

SECOND appeal from the decision of R. Knight, District Judge of Sátára, confirming the decree of Ráo Sáheb Harilal Kirparam, Second Class Subordinate Judge at Karád.

One Swamirao and Ramkrishna (defendants' father) were members of an undivided Hindu family.

Swamirao had a half share and Ramkrishna a one-eighth share in the house in dispute.

On the 18th of April, 1885, in execution of a money decree passed against them, the shares of both were put up to auction and purchased by one Appaji. The sale was confirmed by the Court on 7th July, 1885, and he obtained symbolical possession on 29th July, 1887.

On 10th July, 1889, Appaji sold his interest in the house to plaintiff's father, Vásudev.

On 30th June, 1897, plaintiffs filed this suit to recover by partition their five-eighth share in the house, alleging that they had been dispossessed by defendants in February, 1895.

Defendants contended (*inter alia*) that they had been all along in possession and that the claim was barred by limitation.

The Court of first instance held that the suit was not barred; that it was governed by article 136 of the Limitation Act (XV of 1877), and that time began to run from 7th July, 1885, when the sale was confirmed. The plaintiffs' claim was therefore awarded.

This decision was confirmed, in appeal, by the District Judge, who, however, held that the suit was governed by article 138 of the Limitation Act (XV of 1877).

Against this decision defendants preferred a second appeal to the High Court.

*B. A. Bhagwat* for appellants (defendants).

*Bhaishanker Nanabhai* for respondents (plaintiffs).

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RANADE, J.:—The only point raised in this appeal relates to the question of limitation.

The original suit was brought for possession after partition of a five-eighth share in a house said to have been owned, one-eighth share by Ramkrishna and four-eighth share by Swamirao. Ramkrishna was the father of the present appellants, defendants in the original suit. These two shares were purchased at an auction-sale by one Appaji on 18th April, 1885. The sale was confirmed on 7th July, 1885, and Appaji obtained formal possession on 29th July, 1887. He subsequently sold his interest to plaintiffs' father on 10th June, 1889, and the present suit was brought by plaintiffs on 30th June, 1897, on the ground that, after the death of their father, the plaintiffs were dispossessed by defendants who are Ramkrishna's sons, in February, 1895.

The principal defence was that the defendants had been all along in possession from the time of their ancestors, and that therefore there had been no dispossession, and plaintiffs' claim was time-barred.

In the Court of first instance it was held that the suit was governed by article 136, and the bar of limitation commenced from 7th July, 1885, when the sale was confirmed, and that therefore the claim was not time-barred. The Subordinate Judge relied chiefly on *Mohima Chunder* v. *Nobin Chunder Roy*.[1] But for this ruling he would have been himself inclined to hold that article 138, and not article 136, would have governed the case. In appeal the District Judge held that article 138, and not 136, governed the case, but he held that in applying article 138, the limitation commenced to run, not from the date of sale, 18th April, 1885, but from the confirmation of the sale, 7th July, 1885. He accordingly confirmed the decree of the first Court.

In second appeal Mr. Bhagwat argued that as article 138 applied to the case, the lower Appellate Court was in error in holding that the limitation commenced to run from the confirmation of the sale, and not from the date of the sale. Mr. Bhaishankar, who appeared for the respondents, did not seek to support the decree appealed from on the grounds stated in the

(1) (1895) 23 Cal. 49.

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judgment. He took up his stand on the independent ground that neither article 136 nor 138 applied to the case. As formal possession had been given to the purchaser, article 144 applied, and limitation against the judgment-debtor's sons, the present appellants, commenced to run, not from the date of the sale or of the confirmation, but from the time when formal possession was given.

It seems to us that this contention of the respondents' pleader is correct, and that the decree of the Courts below must be upheld, but on grounds different from those urged in the judgments of those Courts. The Court of first instance no doubt referred to *Umbica Churn* v. *Madhub Ghosal* [1] and *Juggobundhu* v. *Purnanund* [2] as authorities which suggested the view that as the auction-purchaser, Appaji, got formal possession, a fresh starting point of limitation was furnished to Appaji and from Appaji to his assignee the plaintiffs. It may be noted that in *Umbica Churn* v. *Madhub Ghosal* [3] it was held that when formal possession had been given to a decree-holder in execution, he and his assigns might sue the judgment-debtor for possession within twelve years from the time when such formal possession had been given. The Judges who decided this case distinguished *Pearee Mohun* v. *Jugobundhoo Sen*,[4] as in that case formal possession had not been given, and they followed the Privy Council ruling in *Gunga Gobind* v. *Bhoopal Chunder*,[5] because in that case formal possession had been given in the only manner in which it could be given. In *Juggobundhu* v. *Ram Chunder*[6] it was held that symbolical delivery of possession was good against the defendant, and if he still continued in actual possession, he might be turned out by separate suit within twelve years from dispossession. As against third persons, formal possession was of course of no avail. In *Lokessur Koer* v. *Purgun Roy*,[7] it was held that as between the parties formal possession effects a transfer of right. In *Krishna Lall* v. *Radha Krishna*[8] the circumstances were somewhat peculiar. The formal possession was not followed up by any

(1) (1879) 4 Cal. 870.
(2) (1889) 16 Cal. 530.
(3) (1879) 4 Cal. 870.
(4) (1875) 24 Cal. W. R. 418.
(5) (1872) 19 Cal. W. R. 101.
(6) (1880) 5 Cal. 564.
(7) (1881) 7 Cal. 418.
(8) (1884) 10 Cal. 402.

act, and it was therefore held that it was infructuous, and the case was held to be governed by article 138. But this ruling was overruled in *Juggobundhu* v. *Purnanund*.[1] The ruling in *Gossain Dalmar Puri* v. *Bepin Behary*[2] shows how symbolical possession was held not to avail against a third party, who in that case was a permanent lessee.

This brings us to the ruling on which the first Court has relied, viz., *Mohima Chunder* v. *Nobin Chunder Roy*,[3] but that case is clearly not applicable, because the auction-purchaser had never obtained possession, and article 136 was properly applied to the circumstances of the case which was brought in right of private purchase from the auction-purchaser. Where the auction-purchaser had obtained formal possession, but defendant continued in actual possession, it was held in *Hari Mohan* v. *Bahurali*[4] that article 144 applied, and the limitation commenced from the date of the symbolical possession. It is clear from this review of the Calcutta authorities that the Court of first instance was wrong in holding that the present case fell under article 136, and that the ruling in *Mohim Chunder's* case applied.

For other reasons the District Court in applying article 138 appears to have misconceived the proper nature of this suit. The District Judge was right so far as he held, following *Arumuga* v. *Chockalingam*[5]; *Pullayya* v. *Ramayya*[6]; *Govind* v. *Gangaji*[7]; and disapproving *Mohima Chunder* v. *Nobin Chunder Roy*[8]; that article 136 did not apply, but when he thought that article 138 applied, he seems to have lost sight of the fact that formal possession had been given to the auction-purchaser in this case, which gave him a new start for limitation as against the judgment-debtors, and the defendants who are his sons. This view was set forth distinctly in *Agarchand* v. *Rakhma*,[9] where formal possession had been given, and it was held that the limitation commenced with dispossession. The effects of giving formal possession were considered in *Lakshman* v. *Moru*,[10] and Mr. Justice Telang laid

(1) (1889) 16 Cal. 530.
(2) (1891) 18 Cal. 520.
(3) (1895) 23 Cal. 49.
(4) (1897) 24 Cal. 715.
(5) (1892) 15 Mad. 331.
(6) (1894) 18 Mad. 144.
(7) (1898) 23 Bom. 246.
(8) (1895) 23 Cal. 49.
(9) (1888) 12 Bom. 678.
(10) (1892) 16 Bom. 722.

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down that there was no difference between symbolical and actual possession where the contest was between the auction-purchaser or his assigns, who had obtained formal possession, and the judgment-debtors or his heirs. It was also held that article 138 did not apply, but article 144 applied, and the time commenced from dispossession. In *Shankar Bisto* v. *Narsingrav* [1] the right of an auction-purchaser, who obtained symbolical possession, to bring a suit was affirmed. In *Gopal Das* v. *Than Singh* [2] the same view was upheld.

It will thus be seen that the present case does not fall under article 138 for the sufficient reason that formal possession had been given to the auction-purchaser, and the dispute was between the judgment-debtor's son and the assignee the auction-purchaser. Articles 136, 137, 138 obviously refer to cases where no possession, formal or actual, had been obtained through the Court. Article 136 applies to a private purchaser from a person not in possession. Article 137 applies to an auction-purchaser of the rights of a person not in possession, while article 138 applies when the auction-purchase is made of the rights of a judgment-debtor who is in possession at the date of the sale. None of these articles contemplate the case of an auction-purchaser or his assign who has obtained formal possession, and is disturbed by the judgment-debtor or his heirs who continue in actual possession, as was the case in the present dispute. In such a case all the Courts agree in holding that article 138 does not apply, but article 144 applies.

It is not necessary in this view to consider the position taken up by the lower Appellate Court in its judgment that, though article 138 applied, the limitation commenced to run, not from the date of sale, but from the date of the confirmation of the sale. This view is clearly opposed to the ruling in *Govind* v. *Gangaji*, [3] and is inconsistent with the express wording of the Act. The reasons given by the Judge, based as they are on section 316, Civil Procedure Code, were considered by the Madras High Court in *Venkatalingam* v. *Veerasami*. [4] The District Judge does not

(1) (1897) 22 Bom. 667.
(2) (1880) 4 All. 184.
(3) (1898) 23 Bom. 216.
(4) (1893) 17 Mad. 89.

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appear to have noticed the fact that in article 138, the judgment-debtor is in possession at the time of the sale, and he is not in possession under the two previous articles. This accounts for the difference in the wording of that section and the two previous sections. It is, however, not necessary to discuss this point further. While differing thus from the reasons given by the Courts below, we are satisfied that they have arrived at a correct decision as regards respondent-plaintiff's right to maintain the suit. We dismiss the appeal with costs.

*Appeal dismissed.*

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## ORIGINAL CIVIL.

*Before Mr. Justice Crowe; and on Appeal before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Tyabji.*

VALLABHDAS JAMNADAS AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SAKARBAI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1900. *March* 25.

*Hindu law—Inheritance—Brother's grandson preferred to widow of a daughter's son.*

The widow of a daughter's son is not entitled to succeed to the estate of her husband's maternal grandfather in preference to the maternal grandfather's separated brother's grandson.

APPEAL from Crowe, J.

The question raised in the suit was one of succession to the estate of a deceased Hindu.

The property in dispute was the estate of one Narotamdas Narrondas, who died in 1872, leaving a widow (Dewkabai) and three grandsons (Mathuradas, Nensey and Jeewandas), the sons of a predeceased daughter (Deoli), him surviving.

The first plaintiff Sakarbai was the widow of Nensey, one of the said grandsons, and the second plaintiff was her father-in-law Lakhmidas Kimji, husband of the deceased Deoli.

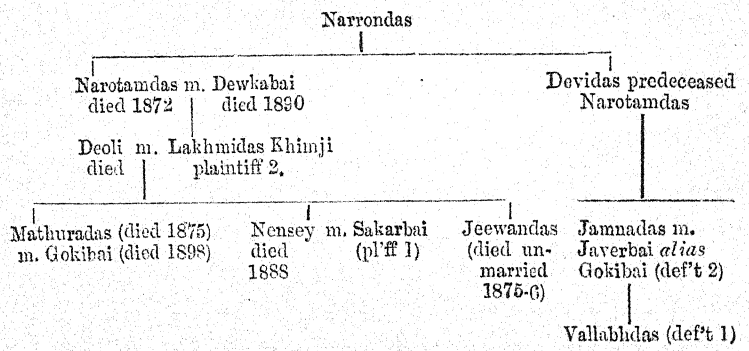
The first defendant Vallabhdas was the grandnephew of Narotamdas Narrondas, being the son of Jamnadas, who was the son of Devidas, the separated brother of Narotamdas Narrondas.

* Suit No. 384 of 1899; Appeal No. 1099.

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The following table shows the relationship of the parties :—




On the death of Narotamdas Narrondas in May 1872, his widow Dewkabai had succeeded to the estate and enjoyed it until her death in September, 1890. Her three grandsons (Mathuradas, Nensey and Jeewandas) had predeceased her. Two of them, *viz.* Mathuradas and Nensey, left widows.

The plaintiffs contended that on her death the estate descended to the widows (Gokibai and the plaintiff Sakarbai) of the two grandsons Mathuradas and Nensey as the heirs of Narotamdas Narrondas. Gokibai had died in 1898, and the plaintiffs claimed that her share passed either to the first plaintiff Sakarbai as heir of Narotamdas Narrondas or to the second plaintiff Lakhmidas Khimji, the father of Gokibai's husband.

The defendant Vallabhdas contended that on Dewkabai's death in 1890 either he or his mother (the second defendant Gokibai) became entitled to the whole estate of Narotamdas Narrondas which Dewkabai had held as his widow.

The question thus was as to whether the plaintiff Sakarbai, the widow of a daughter's son, succeeded to the estate of her husband's maternal grandfather in preference to his separated brother's grandson.

Crowe, J., held that the plaintiffs Sakarbai and Gokibai were entitled to succeed on the death of Dewkabai, and that on Gokibai's death in 1898 her share passed with the rest of the estate to Sakarbai. He therefore gave judgment for the plaintiffs.

The defendants appealed.

*Lang* (Advocate General), *Starling* and *Raikes* for Vallabhdas, the first appellant (original defendant No. 1). *Branson*,

*C. H. Setalvad* and *V. S. Bhandarkar* for the second appellant (defendant No. 2) :—The brother's grandson succeeds in preference to the widow of a daughter's son. The daughter's son takes for special reasons, namely, that he should perform the *shradh* of his grandfather, but this does not apply to his widow —*Lakshmibai* v. *Jayram*[1]; *Lallubhai* v. *Mankuvarbai*[2]; Mayne's Hindu Law, para. 518; West and Bühler, p. 123 *et seq.* The daughter's son has his father's name and belongs to his father's *gotra* and not to the *gotra* of his maternal grandfather. He is therefore only a *bandhu*. The fact that he is an enumerated heir does not make him a *gotraja sapinda*. His widow therefore would take his place as *bandhu, i.e.* subsequent to all the *gotraja sapindas*; she would not take his place as an enumerated heir; all *gotraja sapindas* come before *bandhus*. See West and Bühler, pp. 129, 130; Mandlik, p. 221; Sarvadhikari, p. 296; Bhattacharya, p. 460; *Kesserbai* v. *Valab Raoji*[3]; *Vasudevan* v. *The Secretary of State for India*[4]; *Sethurama* v. *Ponnammal*.[5] A claim by the widow of a daughter's son has never been made before. A "grandnephew" is included in the word "nephew."

*Macpherson* and *Jardine* for the respondents (plaintiffs) :—The widows of the daughter's sons are entitled. In Bombay widows take as *gotraja sapindas* of their husbands—*Lallubhai* v. *Mankuvarbai*.[6] The daughter's son is a *gotraja sapinda*. Nephew does not include grandnephew—*Suraya Bhukta* v. *Lakshminarasamma*.[7]

JENKINS, C.J. :—This is an appeal from the decision of Mr. Justice Crowe, which raises the question whether the widow of a daughter's son is entitled to succeed to the estate of her husband's maternal grandfather in preference to the deceased brother's grandson. It is only in this presidency that such a competition would be possible; for it is only here that females have been accorded such rights as would make a claim to inherit under such circumstances possible.

(1) (1869) 6 B. H. C. R. 152.
(2) (1876) 2 Bom. 388.
(3) (1879) 4 Bom. 188 at p. 203.
(4) (1887) 11 Mad. 157 at p. 187.
(5) (1883) 12 Mad. 155.
(6) (1876) 2 Bom. 388.
(7) (1882) 5 Mad. 291.

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The decisions of this Court have, contrary to the rules of inheritance obtaining in the other presidencies of India, admitted as heirs widows of deceased *gotraja sapindas*, and the point for our decision is whether this right is to be extended to the widows of those who do not fall within that category, for there can be no question that a daughter's son is not a *gotraja sapinda*. These rights of female heirs in Bombay are the result of case-made law, so that it becomes incumbent carefully to examine the cases to see on what they are based. Omitting some early cases it may be said that the decision in *Lakshmibai* v. *Jayram*[1] is the starting point of this new departure. That was a case in which the right of a *gotraja sapinda's* widow to succeed was established. The *ratio decidendi* is to be found at page 156, where it is said:

"From the mention of the great-grandfather's grandmother (*i.e.* the wife or widow of the most remote male *sapindas* in direct ascent) and of the kindred connected by a common libation of water (*i.e.* the *samanodakas* or collateral within thirteen degrees), it is clear that the commentator meant to convey that by a logical interpretation of the Mitakshara, the wives of all *sapindas* and *samanodakas* must be held to have rights of inheritance co-extensive with those of their husbands."

From what follows it is manifest this was intended to be an equivalent statement of the law as suggested in West and Bühler, pp. 52 and 53, of their introductory remarks to the Digest.

The next case is that of *Lallubhai* v. *Mankuvarbai*,[2] which was heard and decided by Sir Michael Westropp, Sir Charles Sargent and Mr. Justice West. The principle of that decision was that the female claimant was entitled to succeed, inasmuch as by marriage she became the *gotraja sapinda* of her husband and of his *gotraja sapindas*. That case afterwards went on appeal to the Privy Council, where the High Court's decision was affirmed (*Lallubhai* v. *Cassibai*).[3] The opinion of the Board was delivered by Sir Montague E. Smith, who thus formulates the proposition then under consideration:—

"If, then, as already pointed out, the wife upon her marriage enters the *gotra* of her husband, and thus becomes constructively in consanguinity or relationship with him, and through him with his family, there would appear to be

(1) (1869) 6 B. H. C. R. 152. (2) (1876) 2 Bom. 388.
(3) (1880) 5 Bom. 110.

nothing incongruous in her being allowed to inherit as a member of that family under a scheme of inheritance which did not adopt the principle of general incapacity of women to inherit. But though it may be consistent with this theory of *sapinda* relationship to admit the widow so to inherit, the existence of the right has still to be established. It is acknowledged that the widow of a collateral relation is nowhere specified and named as heir to members of her husband's family; she must therefore come into the succession, if at all, as one of the class of *gotraja sapindas*, and it is in this way that her claim has been put forward at the bar."

This passage makes clear the ground on which the collateral's widow succeeds: it is because she is a *gotraja sapinda* of her husband's family and so of the propositus, and is not excluded by the law of this presidency on the score of her sex. Therefore, to bring the widow of a daughter's son within the principle of the cases, it must be affirmed that she is a *gotraja sapinda* of her husband's maternal grandfather. But this clearly she is not; she no doubt is a *gotraja sapinda* of her husband and his agnates; the maternal grandfather is not one of his agnatic relations.

It only remains to consider whether on any other ground she is entitled to preference. It has been argued that not to accord to the plaintiff the priority she claims would involve the anomaly that though her husband would have preference over a brother of the deceased and all subsequent male heirs, she would be postponed to their widows; therefore it is urged we should extend to her the fiction or principle by which her husband is entitled to his preferential position as an heir. The argument that rests on the assertion of an anomaly overlooks the reason which justifies the inclusion of a brother's widow—a reason, as I have already shown, which has no application to the widow of a daughter's son. The fiction that we are invited to utilize is that which explains the inclusion of a daughter's son among the compact series of heirs by reference to the old and possibly obsolete doctrine as to an appointed daughter. But though the position of a daughter and a daughter's son in the order of inheritance, as now established, may be historically referable to this doctrine, in fact they now owe their rights to their being named as heirs in the governing commentaries. Nor does there appear to be any reason for extending to the widow of a daughter's son

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the fiction or principle which is alleged to be accountable for her husband's right. The widows of *gotraja sapindas* were admitted by this High Court as heirs in spite of the texts rather than because of them; the texts were bent to fit in with the established customs and conscience of the people. But I am unable to find that there was any such partiality in favour of the widow of a daughter's son; it certainly is not established by any evidence in this case, nor does it appear that any such claim has before this been advanced, though *Lakshmibai* v. *Jayram* was decided over thirty years ago. The distinction, moreover, in favour of the widows of the *gotraja sapindas* is not fanciful; on the contrary, one can well understand how that disposition to admit such widows should stop short when it was proposed to admit into the inheritance of property one who had not even by marriage come into the family to which that property belonged.

For these reasons I think we ought not to extend to the widow of a daughter's son the right to inherit which has been accorded to those who have become by marriage *gotraja sapindas*, and I would accordingly reverse the decree of Mr. Justice Crowe and dismiss the suit with costs here and in lower Courts.

*Decree reversed and suit dismissed.*

Attorneys for plaintiffs :—Messrs. *Little and Co.*

Attorneys for defendants :—Messrs. *Mansuklal, Damodar and Jamsetji.*

# APPELLATE CIVIL.

*Before Mr. Justice Ranade, on reference from Sir L. H. Jenkins, Chief Justice, and Mr. Justice Whitworth.*

HANMANTRAV AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* THE SECRETARY OF STATE FOR INDIA (ORIGINAL DEFENDANT), RESPONDENT.* 1900. *November* 15.

*Possession—Declaration of title—Suit by person in possession for declaration of title—Burden of proof—Evidence—Effect of plaintiffs' possession—Presumption of title—Evidence Act (I of 1872), sec. 110.*

The plaintiffs brought this suit in 1898 for a declaration that certain land in the village of S. belonged to them, and that they might be confirmed in possession. They alleged that they purchased the land in July, 1888, from the pátel of the village, and had been in possession ever since, and that their vendor had previously been in possession. They now sued because their possession had been threatened by the orders of Government officials. It was admitted that the plaintiffs had been in actual possession since 1888.

The District Judge held that the burden of proof of title to the land lay upon the plaintiffs. He was of opinion that they had failed to prove it, and he dismissed the suit.

*Held, per* JENKINS, C.J., and RANADE, J. (WHITWORTH, J., dissenting), that the plaintiffs being in possession (not shown to have wrongfully originated) such possession was good against the whole world except a person who could show better title; that the burden of proving such title lay therefore upon the defendant; that he had failed to prove it, and that therefore the plaintiffs were entitled to the declaration sued for.

*Per* WHITWORTH, J.:—That the evidence did not show such possession in the plaintiffs as under section 110 of the Evidence Act (I of 1872) shifted the burden of proof upon the defendant; that prior to the alleged sale to the plaintiffs in 1888, the defendant had been in the position of an absentee owner of the land in question represented partly by the village officers and partly also by the village community, and that he might be said to be in possession; that the sale to the plaintiffs in 1888 by the pátel of the village, who should have protected the defendant's interests, was a wrongful act; that the plaintiffs were therefore not relieved from the burden of proving their title, and that they had not proved it.

*Per* RANADE, J.:—When a person in possession of land has been dispossessed and sues to recover it, the fact of his previous possession will not entitle him to a decree unless he sues under section 9 of the Specific Relief Act (I of 1877) within six months of the date of dispossession. If he sues after the six months

* Appeal, No. 50 of 1900.

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have expired, he must prove a *primâ facie* title. In such a case he is entitled to a decree unless a superior title is proved on the other side. It is in reference to such cases that it has been held that possession is evidence of title, and that the plaintiff, who proves such possession and subsequent disturbance, shifts the burden of proof on the defendant when the *primâ facie* title is made out. When no such *primâ facie* title is made out by the plaintiff who asks for a declaratory decree, he cannot obtain that decree on the mere ground that he was in possession and the defendant had no title. Mere wrongful possession is insufficient to shift the burden of proof.

APPEAL from the decision of C. H. Jopp, District Judge of Ahmednagar.

Suit for declaration of title. The plaintiffs brought this suit in 1898 in the District Court of Ahmednagar against the Secretary of State for India in Council for a declaration that a certain piece of land in the village of Savargaum belonged to them and praying that they might be confirmed in possession

They alleged that on the 25th July, 1888, they purchased the land from one Patilbowa Dhondji (who, it appeared, was then officiating pátel of the village); that they had ever since that time been in actual possession; that before the purchase their vendor had been in possession; that during their possession they had with the assent of the Government's agent built on the land and spent Rs. 1,600 on it, and that their possession had now been threatened by the orders of Government officials.

The defendant pleaded that the land belonged to him and never belonged to the plaintiffs or their vendor.

It appeared that in 1888-89 there had been an inquiry in the Mámlatdár's Court as to the ownership of this land, and the Mámlatdár had decided that it did not belong to Government, and directed the village officers not to interfere with the plaintiffs if they built on it.

The District Judge, however, dismissed the suit. He was of opinion that the Mámlatdár had no jurisdiction to decide the question of title, and in this suit he held that the burden of proving their title to the land lay upon the plaintiffs and that they had failed to do so.

The plaintiffs appealed.

The appeal was at first argued before the Division Bench composed of Jenkins, C.J., and Whitworth, J.

Ráo Bahádur *Ghanasham N. Nadkarni* for the appellants (plaintiffs).

Ráo Bahádur *Vasudev J. Kirtikar*, Government Pleader, for the respondent (defendant).

JENKINS, C.J.:—The plaintiffs have brought this suit against the Secretary of State for India in Council for a declaration that a site in the village of Savargaum belongs to them, and that they may be confirmed in possession. Their case, shortly, is, that on the 25th of July, 1888, they purchased the site from Patilbowa Dhondji, the consideration being Rs. 20 in cash and Rs. 20 previously lent by the plaintiffs' father to Patilbowa's father on mortgage of the land, and that they thereby became its owners; that possession of the site has since the purchase been with them, and before that with their vendor and his father; that during their possession the plaintiffs have with the assent of the Government's authorized agent built on the land and spent on that object a sum of Rs. 1,600; and that their possession has now been threatened by the orders of Government officials.

The suit came on for hearing before the District Judge of Ahmednagar, by whom the following issues were framed:—

1. Have plaintiffs proved their title to the site in dispute?

2. Is the defendant estopped from denying that plaintiffs are the owners of the site in dispute?

3. Are plaintiffs entitled to the relief claimed in the plaint?

In my opinion the District Judge erred in his omission to frame an issue as to the plaintiffs' possession. The result is that we have no finding on this point, and the District Judge has as a consequence wrongly misconceived the proper incidence of the onus of proof. Section 110 of the Evidence Act provides: "When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner." This section merely formulates the commonplace in the law of evidence, that possession affords *primâ facie* presumption of ownership, and I am aware of nothing that excludes the Secretary of State from the operation of that rule. The first point therefore which I propose to consider is whether the plaintiffs

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are in possession. Admittedly they have been in possession since July, 1888: but can it be said that their possession is of such a character as to attract the presumption described in section 110? in other words, was their possession such as would be recognised by a Court of law? The plaintiffs did not obtain possession by ousting any one, nor can it be said that their possession was not peaceable; for when a question was raised as to the propriety of their possession, the Mámlatdár after inquiry came to the conclusion (whether rightly or wrongly is immaterial for this purpose) that the plaintiffs were entitled to remain in and build. I am not at present considering the possibility of an estoppel resulting from the Mámlatdár's action; I allude to what he did as a circumstance throwing light on the character and quality of the plaintiffs' possession, and I pause here to state that I find nothing to justify the suggestion, which did not even find a place in the argument, that the Mámlatdár acted otherwise than honestly. It seems to me contrary to well-established doctrine to say that this is not such a possession as the law would recognise, and one that would be good against the whole world except the person who can show a good title. To say that a possession is not within the meaning of section 110, unless it is a possession according to title, would be to render that section meaningless, and to introduce a doctrine subversive of the established principles of property law. The matter is thus summed up in Pollock on Torts (4th Ed.) p. 330:—

"Sometimes mere detention may be sufficient; but on principle it seems more correct to say that physical control or occupation is *primâ facie* evidence that the holder is in exercise (on his own behalf or on that of another) of an actual legal possession, and then, if the contrary does not appear, the incidents of legal possession follow. The practical result is that an outstanding claim of a third party (*jus tertii* as it is called) cannot be set up to excuse either trespass or conversion. "Against a wrongdoer possession is a title"; or as the Roman maxim runs '*Adversus extraneos vitiosa possessio prodesse solet.*' As regards real property, a possession commencing by trespass can be defended against a stranger not only by the first wrongful occupier, but by those claiming through him; in fact, it is a good root of

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title as against every one except the person really entitled."

As authority for this last proposition Mr. Pollock vouches *Asher* v. *Whitlock*,(1) to which as well as to the cases on which it proceeds reference may usefully be made. In another passage Mr. Pollock says: "The authorities do not clearly decide, but would seem to imply that it would make no difference if the *de facto* possession violated by the defendant were not only without title, but obviously wrongful."

The propositions thus laid down are of course not binding authorities, but I cite them as they state most clearly what appears to me to be the law. That *Asher* v. *Whitlock* lays down principles to be observed in this Presidency is finally established by the authoritative judgment of Sir Michael Westropp in the case of *Pemraj* v. *Narayan*,(2) heard and decided by a Full Bench of this Court as far back as 1882. In the course of his judgment the learned Chief Justice remarks: "The plaintiff's possession was a good title against everybody except the true owner. This being so, we fail to perceive any good reason for requiring the plaintiff to wait until he is evicted, or preventing him from obtaining a declaration of that which is beyond all doubt his right, *viz.*, that his title as possessor is good against a person who is seeking to disturb that possession, and who has not a colour of title to the land in dispute, and never had possession of it." Then later, in reference to his right to vindicate possession under section 230 of Act VIII of 1859, he says, although the plaintiff "may, if he please, give evidence of his title, he is not bound to do so, but may rest his right to recover on his possession and cast upon the decree-holder the burden of proof of title,—*i.e.* his right to dispossess the applicant. This appears to have been so held in the Calcutta Full Bench Case—*Radha Pyari* v. *Nabin Chandra*,(3) and is quite in accord with the value and import of possession as laid down in the English authorities, to which we have referred, as well as in the Indian Evidence Act I of 1872, section 110." Another and still more authoritative pronouncement is to be found in the recent Privy Council judgment is *Ismail Ariff* v. *Mahomed Ghouse*.(4) There

(1) (1865) L. R. 1 Q. B. 1.
(2) (1882) 6 Bom. 215.
(3) (1870) 5 Ben. L. R. 708.
(4) (1893) L. R. 20 I. A. 99; 20 Cal. 834.

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the plaintiff sought a declaration that he was the sole and absolute owner of the land, and that the same was not dedicated for religious or charitable purposes and that the defendant had no right, title or interest therein or in any part thereof. The defendant denied the plaintiff's possession and relied on a dedication. Both the lower Courts found that the plaintiff was in possession and that the defendant was not the Mutwali. The Court of appeal, however, in Calcutta, differing in this respect from Mr. Justice Trevelyan, held there was a dedication, and declined to "declare that this person, the plaintiff, has a title, when as a matter of fact it is shown he has none." On this ground they dismissed the plaintiff's suit. Their Lordships of the Privy Council in disposing of the case say at page 106 of the Report:—

"It appears to their Lordships that there is here a misapprehension of the nature of the plaintiff's case upon the facts stated in the judgment. The possession of the plaintiff was sufficient evidence of title as owner against the defendant. By section 9 of the Specific Relief Act (Act I of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrongdoer, to obtain a declaration of title as owner, and an injunction to restrain the wrongdoer from interfering with his possession. The Appellate Court, in accordance with the judgment above quoted, has dismissed the suit. Consequently, the defendant may continue to wilfully, improperly and illegally interfere with the plaintiff's possession, as the learned Judges say he has done, and the plaintiff has no remedy. Their Lordships are of opinion that the suit should not have been dismissed; that the plaintiff was entitled in it to a declaration of his title to the land. It was not necessary for him to negative that the land was dedicated to religious or charitable purposes —a question upon which the Original and Appellate Courts have differed, and which, as the only defendant was not entitled to maintain the wakfnamah, and other persons would not be bound

by an adverse decision, their Lordships do not decide. That declaration should be omitted from the decree. Their Lordships will humbly advise Her Majesty to reverse the decree of the Appellate Court, and order the defendant to pay the costs of the appeal to that Court, and to affirm the decree of Mr. Justice Trevelyan, substituting for the words 'the sole and absolute owner' — 'lawfully entitled to possession,' and after the words 'in this suit mentioned,' omitting 'and that the same have not been dedicated for religious or charitable purposes.' The respondent will pay the costs of this appeal."

These principles have received an instructive application in the recent case of *Gangaram* v. *Secretary of State for India*[1] decided by Jardine and Ranade, JJ. There the plaintiff advanced the same claim as here to a site in a village, relying on the fact that ten or fifteen years before he had built a cattle-shed on the land and that prior to that he had erected sheds on it each year and kept fodder, grain and earth on the site. The District Judge, disbelieving the evidence as to keeping fodder and grain there and as to the yearly building of the shed, dismissed the suit, and from this the plaintiff appealed. The High Court held that the plaintiff had failed to prove title and refused to grant him the declaration of title he sought. They, however, granted him relief in protection of his possession, and in so doing they said: "The plaint, however, contained a prayer that the plaintiff might be awarded any other relief to which he might be entitled. If he had made reference to section 42, illustration (*g*), of the Specific Relief Act, or if the Court had noticed that illustration which refers to suits brought for confirmation of possession, it is probable that an issue would have been raised as to whether the plaintiff was entitled as against the defendant to be retained in possession. There is no evidence on the record of the defendant's title; and it is found by the Judge that the plaintiff has held possession for at least ten years and has built a shed on the land. These facts appear to us to bring the case within the ruling of their Lordships of the Privy Council in *Ismail Ariff* v. *Mahomed Ghouse*." [2]

This case is singularly apposite, because it distinctly shows that even in the case of a village site, Government cannot rely on

(1) (1895) 20 Bom. 798. (2) (1893) L. R. 20 I. A. 99.

any general presumption: and that as against the party in possession it must show title. It seems to me that this case is a direct authority founded on the soundest principles, and that it is strictly applicable to the present case. Moreover, this case does not stand alone; for as far back as 1869 I find in the case of *Shama Soondaree Debia* v. *The Collector of Maldah*[1] the following principles were enunciated by Mr. Justice Mitter, the defendant-Collector in that case being the representative of the Government:—

"If the plaintiff can prove that she was in possession of the property in dispute until she was ousted by the defendant against her consent, and without the intervention of a Court of law, the defendant ought to be called upon to prove his title. If the defendant succeeds in proving his title, the plaintiff ought then to be required to prove a better one. That evidence of possession, however short, is evidence of title, is an undisputed proposition of law, and it therefore follows that such evidence is at least sufficient to make out a *primâ facie* case in favour of the party by whom it is given."

Probably it would not be difficult to multiply instances, but I am content to abide by the principles thus stated over thirty years ago and reaffirmed in this Court by a decision which is binding on us.

This, then, is how the law stands. I am conscious of having laboured what may seem to be an elementary point, but I have done so, as the true value of possession without proof of title does not seem to me to have been accurately appreciated. The plaintiffs, therefore, being in possession, how has the defendant shown that he is the true owner? The evidence in the case is in part documentary and in part oral: I will first deal with the former. It consists of statements in documents relating, not to the site in suit, but to adjoining premises. These documents have not been translated, but they consist of a sale proclamation, a rent-note and a map, and the statement in them which the defendant calls in aid of his case is one which gives the land in suit as one of the boundaries, describing it as "Government open ground,"

(1) (1869) 12 Cal. W. R. 164.

"open ground," and "vacant land." But how is such a statement relevant? An attempt was made to bring it in either under section 13 (*a*) or section 32 (4). Obviously neither of them is apt for that purpose: for, so far as section 13 (*a*) goes, it is impossible to say that any one of these documents was a transaction by which any right in the site in suit was created, &c.; there was merely an incidental reference to it, the subject-matter of the transaction being another piece of land. Nor, on the other hand, have those conditions been established on which alone a statement would be admissible under section 32 (4). So it now only remains to consider the oral evidence, and in so doing it is important to bear in mind what the true object of proof is: it is whether the Government has shown a title to the property, and in this connection it is important not to be influenced by preconceived ideas as to the general ownership of Government: for each case must be decided by what is proved in it. *Quod non apparet non est*; or, as it has been recently expressed by Lord Halsbury, "of things that do not appear and things that do not exist, the reckoning in a Court of law is same." Now there are three witnesses on whom the defendant has relied. The first is Balvant, who is about thirty-three or thirty-four. He is a kulkarni and states in his evidence, which was given on November 18th, 1899, that he had known the site for the last eleven or twelve years. He says:—

"There was no building on this ground when I first saw it eleven or twelve years ago. The site was an open one. When I began to serve as kulkarni, Hanmant Ram Hukumchand began to occupy it. This was ten years ago. He began to build on the site. * * * When he began to build, I do not know if any one had occupation of the land. I do not know whether Government or any private person owns it."

The evidence in no way establishes the Government's title: the witness's knowledge does not extend back, at the outside, more than a year beyond the period of plaintiffs' admitted possession: he is not even able to express an opinion (for what it may be worth) as to the existence of any general right over the land. The next witness is Rama, who is twenty-five or thirty years old and lives in a hamlet one mile from Savargaum. He says the site

was an open one, but he does not know to whom it belongs. This witness admits he saw stones on the ground nine or ten years before the building was put up, but he says cattle were not tied, nor did he ever see a chupper for cattle on the site. He does not know whose people in the village say the site is. His evidence therefore also fails to show a title in the Government, at most it negatives certain acts of ownership asserted by the plaintiffs prior to 1888; but with this aspect of his evidence I will deal later. The next witness is Ganesh, who is merely called to prove a map, but he makes one statement in the course of his evidence which is deserving of notice. He states that he inquired among the villagers and ascertained that the open space belonged to Government. This statement, I need hardly point out, has no evidentiary value, but it is curious that no effort was made to call those villagers from whom the witness gleaned this information, for it cannot have been from the two witnesses whose evidence I have examined that he obtained it. I now come to the last witness, Bapu, who no doubt states that the site is "Government waste open space" and that "the villagers believing the land was Government land gave it to the Kumbárs for making pots." The Government Pleader refrained, and I think properly, from pressing the evidence of this witness; for it is obvious that the relations between him and the plaintiffs were of a character calculated to influence his evidence adversely to them.

This, then, is the evidence, and after giving it the best consideration I can, it has failed to establish to my satisfaction Government's title to the land, or any possession by Government within sixty years before the commencement of this suit.

It would suffice to stop at this point, but as this is a first appeal I think it better shortly to examine the evidence adduced on the plaintiffs' behalf for the purpose of proving possession and acts of ownership by their vendor and his father. They first endeavoured to show that the property had been mortgaged by the vendor's father to theirs, and they went further and sought to make out that there had been a written document. This the District Judge declined to believe, because it is stated in the sale-deed—the genuineness of which is undisputed—that there was a mortgage, but without a document. I think the Judge was right in

discrediting the existence of a written mortgage, but I am by no means satisfied that he should for that reason have held that there was no mortgage at all, seeing that the fact of a mortgage was corroborated by the statement in the sale-deed. I see no reason for supposing that the statement in the deed as to a mortgage was manufactured for future contingencies, for had that been the design, the conspirators would hardly have stopped short at an oral mortgage. Indeed, the District Judge himself does not suggest such a theory. The position therefore would appear to be this, that so far as the plaintiffs swear to a written mortgage they are contradicted by the statement in the sale-deed, but so far as they assert that there was a mortgage, they are corroborated by the same statement, which is properly admissible for that purpose (Evidence Act, section 157). The doctrine *falsus in uno falsus in omnibus* in this country affords a test of little or no value; for it is to be feared that "there is almost always a fringe of embroidery to a story however true in the main," and I should myself hold, on the evidence, that there had been an oral mortgage, if a finding on the point were necessary. I do not, however, place much stress on this alleged mortgage, but there is other evidence of acts of ownership which has been too summarily dismissed by the District Judge owing, no doubt, to his failure, in the first instance, to determine the question of possession, and observe the legal consequences resulting therefrom. The rest of the documentary evidence produced by the plaintiffs consists of documents relating to other land and referring to the site in suit in the description of boundaries in a manner suggestive of its having belonged to Dhondi Ganji. Two of these documents are Exhibits 41 and 32, as to which the District Judge says they "have, in my opinion, probably been forged for the purposes of this suit." For this reason he not only declines to place reliance on these documents, but he also uses them to nullify the evidence of witnesses 31, 40 and 39 on the ground of their connection with these documents, and for this reason he thinks their testimony is not of any value. I am not disposed to agree with this: but however that may be, it does not enable him to get rid of the testimony given by Gulabchand (Exhibit 43). This witness is seventy years of age and swears that he has known the site for fifty years. It is true he does not live

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in Savargaum, but in Ane, three miles off; still he asserts that he is always going there. He swears to the existence of the chupper on the site and the tying of cattle there. "I saw Dhondji's possession," he says, "for about twenty years; Dhondji mortgaged the site to Hukumchand. I learnt this, as I used to tie my horse there." Then he gives some details as to the chupper and deposes that a dinner was given on the site on Hukumchand's anniversary. In cross-examination he re-asserts that he tied his horse in the shed, and swears that there were signs of cattle having been there. To judge by the cross-examination, the fact of this witness being a moneylender is suggested as a discrediting circumstance. I am led by this to cite what has been said in this connection by their Lordships of the Privy Council:

"Their Lordships are led by the judgment under review and by some portion of the argument which has been addressed to them to state, as has often been stated before by this committee, that the ordinary legal and reasonable presumptions of facts must not be lost sight of in the trial of Indian cases, however untrustworthy much of the evidence submitted to these Courts may commonly be; that is, due weight must be given to evidence there as elsewhere, and that evidence in a particular case must not be rejected from a general distrust of native testimony, nor perjury widely imputed without some grave grounds to support the imputation. Such a rejection if sanctioned would virtually submit the rights of others to the suspicions and not to the deliberate judgment of their appointed Judges. Nor must an entire history be thrown aside because the evidence or some of the evidence of some of the witnesses is incredible or untrustworthy."—*Ramamani* v. *Kulanthai*.[1]

As a matter of fact I do not find that the District Judge disbelieved this man; all he says with regard to him is, "I do not think that his testimony is sufficient to establish that Dhondi, father of Patilbowa, owned the site, more especially as the mortgage to the plaintiffs has not been produced, and as in the proclamation and other papers relating to the sale of a neighbouring site to one Jethiram on October 13th, 1878, this piece of ground is entered

(1) (1869) 14 Moore's I. A. 354.

as belonging to Government." I take this criticism to mean this, that Gulabchand's evidence does not, as against the matters to which the District Judge refers, establish ownership, and had that been a correct exposition of the position there would be much in its favour. He does not, however, say that his evidence is not to be believed, or that so far as he deposes to particular facts, he is to be discarded. Why should we not give credit to this man? Surely the fact of his being a moneylender cannot, *per se*, be sufficient, and I must confess I cannot accept the evidence of Rama, who is now only twenty-five or thirty, as outbalancing Gulabchand's evidence relative to matters that occurred when Rama was a mere lad. It may be that Gulabchand's evidence would not alone go far towards establishing possession, but at any rate it shows that the plaintiff obtained possession from one who did exercise, rightly or wrongly, certain acts of apparent ownership, and so is confirmatory of the view that the plaintiffs' possession is one which the law will protect.

I have alluded to this evidence not so much because it is necessary for the plaintiffs' case, but because it helps to dispel the view (which I think, even apart from it, unsound,) that the plaintiffs had not such possession as section 110 of the Evidence Act contemplates. It further makes it clear that there is no evidence which shows a possession by Government at any time within sixty years. It is true that the site with which we are concerned is *gavthan* land, and some stress is laid on this fact, but I think without good reason. According to Wilson, *gavthan*, apparently a corruption of *gaonthan*, means "site of a village, whether in ruins or still standing." Even in the absence of judicial decision I should not have regarded land of this character as inviting any inference that it was the unfettered property of Government. As a matter of fact the view I entertain has the sanction of the decision in *Gangaram's* case. Reference has been made to section 37 of the Land Revenue Code, but that appears to me in no way to advance the defendant's case, for it only relates to that which is not the property of individuals &c., and even then subject to such rights as may be established over the same. It in no way disturbs the presumption arising from possession or the legal results that flow therefrom.

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I would therefore reverse the decree of the lower Court and declare that the plaintiffs are lawfully entitled to possession of the land in suit and the shed thereon. As there is a difference of opinion the case will be referred to Mr. Justice Ranade.

WHITWORTH, J.:—The plaintiffs brought this suit for a declaration that they were the owners of a site within the village of Savargaum, and for recovery of its possession, alleging that they had bought it in 1888 from one Patilbowa, and that they and their father had previously held it in mortgage from Patilbowa's father Dhondi. There is no evidence of Dhondi's title, and the plaintiff's case rests upon (1) their possession since their purchase in 1888, and (2) the previous possession of their vendor or of his father or of themselves or their father as mortgagees.

The first question that arises is: Was this possession at any stage of such a character as, under section 110, Evidence Act, to put on the defendant the burden of proving that the plaintiffs are not the owners of the site? I cannot find that it was. The conclusions that I would draw from the evidence are (1) that the possession alleged to have been exercised before the sale consisted merely of such acts as are permitted to any villagers in respect to an open space in a village, so long as no one is prejudiced by them, and which would be permitted to an influential person such as the pátil of the village (as both Dhondi and Patilbowa in turn were) even if they were somewhat prejudicial to public convenience; and (2) that the actual possession taken after the execution of the deed of sale in 1888 was a merely wrongful act.

Without asserting that section 110 of the Evidence Act does not apply to the Secretary of State (who is defendant in this case) as well as to any private person, it is still necessary to consider the character of his possession of any land in India. He is an absentee owner represented in a village partly by the village officers and partly also (I think) by the village community. An open site in a village—and especially one with several roads about it as, from the map, the one in question appears to be—is useful as affording space to move in, to meet, to furnish air and so on; and so long as a community are deriving such advantages from an open space in a village, the Secretary of State may, i

seems to me, be said to be in possession of it: and the conversion of such a space to building purposes by a private person amounts to ousting the Secretary of State from his possession.

In estimating the character of the plaintiffs' act in taking the deed of sale and proceeding to build, it is to be observed that the person from whom he purported to buy was the person—or at any rate was a member of the family of the person—on whom primarily devolved the duty of protecting the defendant's interests. As Patilbowa says in his evidence that he was officiating pátil for five years fifteen years ago (speaking in 1899), it would appear that he was actually pátil at the time of the deed of sale in 1888. And even if he was not, he was still regarded as sufficiently representing the family as to make his sole signature satisfactory. And the fact that the pátil's immediate superior, the Mámlatdár, went beyond his duty and authority in order to confirm the plaintiffs in the possession they had taken, so far from strengthening the plaintiffs' case, to my mind only throws additional suspicion on the whole transaction. And the complaisance of the Mámlatdár having been secured, it is by no means surprising that the plaintiffs should have confidently proceeded to expend large sums in building. So that that incident also, I think, loses all significance.

The plaintiffs' documentary evidence consists only of deeds between third persons in which the site in dispute in being referred to as a boundary is called by the pátil's surname of Garji. If such a statement is relevant at all, it can be of but very small value, and in no way better than the similar opposing evidence on the part of the defendant that in other documents the same site was referred to as Government open land. But it is noticeable in this connection that according to the evidence of the plaintiffs' witnesses their father Hukumchand got possession of the site (according to their statements of period) about the year 1861, while their documents are dated 1869 and 1879. If there were mortgage and possession as alleged, the site would by 1869 or 1879 have been more naturally referred to as the Márwádis' site than as Garji's.

Holding, as I do, that the plaintiffs are not relieved of the burden of proving their title, I have no hesitation in accepting

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the District Judge's conclusion that they have not proved it. If the pátil's family had had any real title to the site, I cannot but think that better evidence would have been available; and if there had been any written mortgage, I cannot but think that the Márwádi, a man of business, would have been careful to preserve it. And the oral evidence, even if accepted, would not establish ownership or right of possession. The case of *Gangaram* v. *Secretary of State* [1] seems to me to differ in an important particular from the present one (though perhaps some of the views advanced in this judgment may not be wholly reconcilable with that decision). For in that case it is said that there were "old walls" on the site in dispute, a fact that would indicate that the site had been in the past private property, and not an open space beneficial to the community at large. I would dismiss the appeal with costs.

Owing to the difference of opinion between the Judges the appeal was referred to Ranade, J., for final decision under section 575 of the Civil Procedure Code, 1882.

Ráo Bahádur *Ghanashám N. Nadkarni* for the appellants (plaintiffs).

Ráo Bahádur *Vasudev J. Kirtikar* (Government Pleader) for the respondent (defendant).

RANADE, J.:—The difference of opinion which has led to this reference relates to the question whether the possession of the appellant-plaintiffs in this case was or was not of such a character as to place on the respondent-defendant, under section 110 of the Evidence Act, the burden of proving that plaintiffs were not owners of the land. The Chief Justice was of opinion that the burden of proving that plaintiffs were not owners lay on the defendant, who affirmed that the plaintiffs in possession were not such owners. Mr. Justice Whitworth was of opinion that the possession of the plaintiffs was not of that exclusive character claimed for it, and that it was only of the sort which is permitted to any villagers in respect of an open space in a village, and that the actual possession of the plaintiffs under the deed of sale was a wrongful act. The difference of view is thus chiefly

[1] (1895) 20 Bom. 798.

about the character of the possession enjoyed by the appellant-plaintiffs.

It was admitted by the Government Pleader that under section 110, possession, when long and continued up to a recent date, leads to a presumption of title. Where the conflict is between mere previous possession and recent actual possession, the fact of previous possession will not entitle plaintiff to a decree except in suits under section 9, Act I of 1877, brought within six months from dispossession. Where this period is exceeded before a suit is brought, and is less than the limitation law requires, he must make out a *primâ facie* title—*Purmeshur Chowdhry* v. *Brijo Lall Chowdhry*(1); *Debi Churn Boido* v. *Issur Chunder Manjee*(2); *Ismail Ariff* v. *Mahomed Ghouse*(3); *Ramchandra Narayan* v. *Narayan Mahadev.*(4) And section 110 refers to the presumption to be made of ownership based on the circumstance of such possession, and allows the plaintiff with such *primâ facie* title to claim a decree where no superior title is proved on the other side. It is in reference to such cases that it has been held that possession is evidence of title, and the plaintiff who proves such possession and subsequent disturbance, shifts the burden of proof on the defendant when the *primâ facie* title is made out—*Pemraj Bhavaniram* v. *Narayan Shivaram*(5); *Krishnarav Yashvant* v. *Vasudev Apaji.*(6) Where no such title is made out, and plaintiff comes to the Court and asks for a declaratory decree, he cannot obtain that decree on the mere ground that he was in possession and the defendant had no title. Mere wrongful possession is insufficient to shift the burden of proof. This seems to me to be the true construction to be placed on section 110. Any other construction would, as the Chief Justice has observed in his judgment, make the section virtually without any purpose.

As regards plaintiff's possession there is no dispute. He has been actually in possession since 1888. The Mámlatdár, who made the first inquiry, found him in possession, and ordered the village authorities not to disturb him. Though the Assistant

(1) (1889) 17 Cal. 256.
(2) (1882) 9 Cal. 39.
(3) (1893) 20 Cal. 834.
(4) (1886) 11 Bom. 216.
(5) (1882) 6 Bom. 215.
(6) (1884) 8 Bom. 371.

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Collector decided against him, the order of removing the building has not been carried out, but both the Collector and the Commissioner have only required the plaintiff to pay rent and the price of the land to Government, on failure of which alone he was to be evicted. The possession being thus in the plaintiff, the next question is whether it was a wrongful possession or whether it was a possession with a *primâ facie* title. Mr. Justice Whitworth holds that it was a wrongful possession, while the Chief Justice is of opinion that it was a possession founded on a *primâ facie* right, which under section 110 shifted the burden of proof on to the defendant. On a careful consideration of the evidence I am inclined to agree with the Chief Justice on this point. In the first place there is the deed of sale to which no objection can be taken. It was produced before the Mámlatdár, and this shows that it was not a hole-and-corner affair. The Mámlatdár took evidence and gave orders confirming plaintiffs' right (Exhibits 20 and 21). The Mámlatdár's order was passed on 26th November, 1888, *i. e.* four months after the deed of sale. He may have exceeded his powers, but his *bona fides* cannot be questioned. The Assistant Collector's order was passed three years after in December, 1891, and in the interval plaintiffs had built the house on the strength of the Mámlatdár's decision. It is to be noted that the deed of sale recites a previous mortgage which took place ten or twenty years before the deed of sale. This mortgage has been disbelieved, because the plaintiff and the vendor have given contradictory accounts as to what was done with the mortgage bond, which, according to their previous statements, was in writing, while the deed of sale says that there was no writing. The situation of the land and its description as "*bakhal*" have also to be borne in mind. The house built by the plaintiff has no doubt small roads on four sides, but beyond these roads there are plaintiffs' and other peoples' houses on all sides. It may be that the pátils have encroached upon this Government land by reason of having their houses and lands in the neighbourhood, but the encroachment must have taken place long ago, and under any circumstances plaintiffs are not shown to have been in any way concerned with the wrongful encroachment. The oral evidence on both sides has been noticed by the Chief Justice in his judgment

and it is not necessary to go over that ground again. The witnesses for the defendant have either no real knowledge, or are on bad terms with the plaintiffs. The Kulkarni Bapu (Exhibit 63) admitted this enmity in the most explicit manner. Plaintiffs' witnesses are comparatively disinterested men, who had longer opportunities to be acquainted with the facts. They are therefore more reliable.

On the whole, therefore, plaintiffs had not only possession, but possession accompanied with proof of title sufficiently strong to shift the burden of proof. The burden so shifted has not been discharged by the oral and written evidence adduced on behalf of the defendant. The two documents adduced on his behalf are inconclusive, and the witnesses have no positive knowledge that the land belongs to Government. The facts of the case appear to me to be entirely governed by the ruling in *Gangaram* v. *The Secretary of State for India*,[1] where the plaintiff held possession for ten years and had built a shed on the site of old walls. The plaintiffs in the present case have been in possession for ten years, and plaintiffs' vendor had previously mortgaged the land for ten or twenty years before during which time chuppers are said to have been built. The land is admittedly "*gaothan*" and "*bakhal*" land attached to houses in village sites. The plaintiffs' possession therefore was not wrongful, and it was founded on a *primâ facie* title which must be protected under section 110 till defendant showed better title. This the defendant has failed to do in the present case, and I therefore agree with the Chief Justice in reversing the decree of the lower Court.

*Decree reversed.*

(1) (1895) 20 Bom. 798.

## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

1900. *November 5.*

VENKAPPA BAPU AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* JIVAJI KRISHNA AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Adoption—Adoption by a mother succeeding to her son who has been married—Ceremonial competency of the son no bar to the adoption—Only limitation to a mother's right to adopt—Hindu Law.*

A mother succeeding as heir to her deceased son who has left neither widow nor issue, is competent to adopt, notwithstanding the fact that her deceased son had attained ceremonial competency by marriage, investiture or otherwise before his death.

The real limitation on a mother's right to adopt when she succeeds as heir to her son does not depend upon the investiture, marriage or ceremonial competency of her deceased son, but upon the question whether by such adoption she derogates from any other rights save her own.

Jivaji Krishna, the holder of a kulkarni vatan, mortgaged the vatan lands to the defendants in 1879. He died in 1884 at the age of thirty without issue. His wife had predeceased him, and his mother Tulsava therefore succeeded as heir. In 1894 she adopted the plaintiff and died shortly afterwards. In 1896 the plaintiff brought this suit to set aside the mortgage and recover the mortgaged lands. The defendants contended (*inter alia*) that Tulsava's right to adopt had been extinguished because her deceased son had been married and had attained ceremonial competency, and that the plaintiff's adoption was therefore invalid and his suit could not be maintained.

*Held*, that the plaintiff's adoption by Tulsava was valid, inasmuch as it only affected her own interests and did not affect the vested rights of others.

SECOND appeal from the decision of T. Walker, District Judge of Dhárwár, confirming the decree of Ráo Bahádur V. V. Wagle, First Class Subordinate Judge at Dhárwár.

Suit by an adopted son to set aside the alienation of vatan lands.

One Jivaji Krishna, the holder of a kulkarni vatan, mortgaged the vatan lands in 1879 to the defendants who were his kinsmen. In 1884 he died at the age of thirty without issue. His wife had predeceased him.

On his death his mother Tulsava succeeded him as his heir. She adopted the plaintiff Jivaji, and shortly after the adoption she died.

* Second Appeal, No. 24 of 1900.

In 1896 plaintiff Jivaji brought this suit to set aside the mortgage effected by the deceased Jivaji and to recover possession of the mortgaged lands.

Defendants contended (*inter alia*) that plaintiff's adoption was invalid; that Tulsava was not competent to adopt, her own son having reached the age of ceremonial competency before his death.

The Subordinate Judge decreed the plaintiff's claim, holding that his adoption was valid.

This decision was upheld in appeal by the District Judge.

Defendants preferred a second appeal to the High Court.

*Shamrao Vithal* (with *P. M. Mehta*) for appellants (defendants): —The adoption of the plaintiff was not valid. Tulsava's own son had been married and had reached the age of thirty before he died. A mother who succeeds as heir to her son is competent to adopt if her son has died unmarried. But if he has been married and dies, she has no power to adopt.—*Payapa* v. *Appanna*[1]; *Amava* v. *Mahadgauda*[2]; *Sangapa* v. *Vyasapa*[3]: see also *Ram Soondur Singh* v. *Surbanee Dossee*.[4] The same rule is laid down by the Privy Council in *Bhoobun Moye* v. *Ram Kishore*.[5] When the son is married, he attains full ceremonial competency, and his mother's power to adopt is extinguished. Tulsava therefore was not competent to adopt the plaintiff, and the adoption by her is invalid.

*Setlur* (with *K. H. Kelkar*) for respondents (plaintiffs):—A mother who inherits property directly from her son can always adopt—*Gavdappa* v. *Girimallappa*[6]; *Payapa* v. *Appanna*.[7] This is a necessary corollary of the recognition of the power given to widows to adopt several sons in succession—*Vellanki Venkata* v. *Venkata Rama*.[8] The cases which limit the power of the mother to adopt are cases in which property has come to the mother after having descended to another heir of the son—*Bhoobun Moye* v. *Ram Kishore*[9]; *Pudmacoomari* v. *Court of Wards*[10];

(1) (1898) 23 Bom. 327.
(2) (1896) 22 Bom. 421.
(3) (1896) P. J. 528.
(4) (1874) 22 Cal. W. R. 121.
(5) (1865) 10 M. I. A. 279 at p. 311.
(6) (1894) 19 Bom. 331.
(7) (1898) 23 Bom. 327.
(8) (1876) 4 I. A. 1; 1 Mad. 174.
(9) (1865) 10 M. I. A. 279.
(10) (1881) 8 I. A. 229; 8 Cal. 302.

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*Thayammal* v. *Venkatarama*[1]; *Krishnarav* v. *Shankarrav*[2]; *Taracharn* v. *Sureshchandra*.[3] There is no reason why marriage should be taken as the period of ceremonial competency. It is one of the sixteen ceremonies enjoined on the twice-born classes, and as compared with the ceremony of *upanayana* it is secondary in importance. On this point our contention is twofold. We say, first, that the doctrine of ceremonial competency has in the most recent cases been held to be unimportant—*Sangappa* v. *Vyasappa*.[4] Secondly, even if that test be applied, the question of marriage or no marriage is immaterial. Here the ceremonial capacity obviously refers to funeral and religious ceremonies. The chief authorities on the ceremonial law in this Presidency are Nirnaya Sindhu and Dharma Sindhu. They lay down that a boy attains competency to perform his father's *shradha* on the performance of *bhudakarma*, which may be at the end of the first year according to some, and at the end of the third year according to others. But the true principle as laid down in *Vellanki Venkata's* case[5] is that so long as the mother does not divest any estate but her own, she may adopt.

RANADE, J.:—In this appeal the only point argued before us had reference to the validity or otherwise of the adoption of the plaintiff-respondent No. 1 by one Tulsawa. This Tulsawa had succeeded as heir to her natural son who died at the age of thirty in 1884, leaving no nearer heir to him than his mother as he left no issue and his wife had died before him. Tulsawa, it appears, had at first adopted her daughter's son, but this adoption was set aside by the Civil Court in 1893. Thereupon she adopted the present plaintiff No. 1 as her son in 1894. The natural son of Tulsawa, with his mother's consent, had mortgaged some vatan lands in 1879 with the defendants who were his distant cousins, and the present suit was brought to set aside this alienation.

The defence was that plaintiff No. 1's adoption was not valid

(1) (1887) 14 I. A. 67; 10 Mad. 205.
(2) (1892) 17 Bom. 164.
(3) (1889) 16 I. A. 166; 17 Cal. 122.
(4) (1896) P. J. 525.
(5) (1876) 4 I. A. 1; 1 Mad. 174.

as Tulsawa had no power to adopt the plaintiff, when her natural son had died at the age of thirty. The other objections under the Vatan Act &c. need not be noticed as they were not pressed in appeal. Both Courts held that plaintiff No. 1's adoption was valid as Tulsawa had succeeded as heir to her son who died without issue and whose wife had died before him, and she had therefore the right to adopt the plaintiff.

The only question we have to consider is whether under the circumstances the adoption was properly held valid. Mr. Shamrao, who appeared for the appellants, contended that a mother who succeeded as heir to her son might make a valid adoption if her natural son died unmarried. But if he was married, the mother's power to adopt was extinguished and the estate must go to the reversionary heir of the son, especially in the case of a Brahmin family such as the one to which the parties belonged. This contention of Mr. Shamrao was apparently based on what is stated in *Payapa* v. *Appanna*,[1] where on page 331 occurs the remark that the widow's power to make an adoption is recognized when she succeeds as mother and heir to an *unmarried son*. In *Sangapa* v. *Vyasapa*[2] there is a similar remark of Mr. Justice Fulton, which says that in such a case the test is whether the son died *unmarried* rather than whether he had attained ceremonial competency. This test of the son dying unmarried appears to have been also mentioned in *Ram Soondur Singh* v. *Surbanee Dossee*.[3] In the leading case on the subject—*Mussumat Bhoobun Moyee* v. *Ram Kishore*[4]—the same test is suggested in the remarks of their Lordships of the Privy Council. In West and Bühler, page 986, the remark appears that it is the investiture of the son which gives him ceremonial competency. If the son dies before that period the widow may adopt. But after that stage it does not appear that the capacity of adoption can revert to the mother. It will be noted that this passage from West and Bühler fixes the competency of the mother at a much earlier stage than even Mr. Shamrao admitted was reasonable and proper. Mr. Shamrao would fix the limit at marriage and not

(1) (1898) 23 Bom. 327.
(2) P. J. for 1896, p. 528.
(3) (1874) 22 W. R. 121.
(4) (1865) 10 M. I. A. 311.

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at the investiture as is done by the writers of the Digest. As regards ceremonial competency Mr. Justice Fulton would assign to it a more subordinate place than to the test of marriage—*Amava* v. *Mahadgauda*.(1)

We have thus tried to sum up the points raised on behalf of the appellants. It appears to us, however, that the real limitation on the mother's right to adopt when she succeeds as heir to her son really does not depend upon either investiture, or marriage, or competency of the son to whom she succeeds as heir. The mention of marriage or ceremonial competency or investiture may have had reference to the particular facts of each case. When the authors of the Digest laid down the limits of investiture or ceremonial competency they had obviously in mind the religious law. When they come to discuss the decided cases they refer to *Bhoobun Moye* v. *Ram Kishore*(2) as laying down the law that the widow can exercise the authority *when her son dies unmarried or leaves no child or widow behind*. The true principle was first enunciated in express terms by the Privy Council in *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya*,(3) where the law was laid down that the mother may adopt when by such adoption she derogates from no other rights save her own as her son's heir. Whatever ceremonial defects there may be, the principle that the widow succeeding as heir to her son—which implies that the son has left neither widow nor issue, may adopt—has been now confirmed by a series of decisions commencing with *Bhoobun Moyee Debi's* case and coming down to our own time—*Bhoobun Moye* v. *Ram Kishore*,(4) *Rajendro Nath* v. *Jogendro Nath*,(5) *Sri Raghunadha* v. *Sri Brozo Kishoro*,(6) *Rajah Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya*,(7) *Pudma Coomari Debi* v. *The Court of Wards*,(8) *Thayammal* v. *Venkatarama*,(9) *Rakhmabai* v. *Radhabai*,(10) *Rupchand* v. *Rakhmabai*,(11) *Annammah* v. *Mabbu*

(1) (1896) 22 Bom. 421.
(2) (1865) 10 M. I. A. 279.
(3) (1876) L. R. 4 I. A. 1.
(4) (1865) 10 M. I. A. 279.
(5) (1869) 14 M. I. A. 67.
(6) (1876) L. R. 3 I. A. 154 at p. 193.
(7) (1876) L. R. 4 I. A. 1.
(8) (1881) L. R. 8 I. A. 229.
(9) (1887) L. R. 14 I. A. 67.
(10) (1868) 5 Bom. H. C. R. (A.C.J.) 181.
(11) (1871) 8 B. H. C. R. (A.C.J.) 114.

*Bali*,[1] *Kally Prosonno* v. *Gocool Chunder*,[2] *Sri Dharnidhar* v. *Chinto*.[3] The argument that the *sacra* are in proper hands when the widow takes possession of them as heir to a son who dies before marriage but after investiture applies equally to a widow who adopts because her married son dies without leaving issue or widow.

The text writers on the Dattaka Law permit a man to adopt a son not only when he has no male issue born to him, but also when such male issue dies. The husband can confer this same double power on the widow, and though in this Presidency the husband's expressed permission is not required by the widow, the mother who adopts a son, because the son born to her is dead and has left no issue or widow behind, really exercises the authority conferred on her by implication by her husband. Where, therefore, she divests by her act of adoption no other estate but her own, her power cannot properly be questioned. This was the view taken by Ranade, J., in *Gavdappa* v. *Girimallappa*[4] where he distinguished the decision in *Kishnarav* v. *Shankarrav*[5] on the ground that in this last case the son's widow survived her husband and it was therefore held that the general rule that no vested interest can be divested by the act of adoption applied. Mr. Justice Parsons and Mr. Justice Ranade reaffirmed this view in *Payapa* v. *Appanna*.[6] Mr. Justice Fulton in *Amava* v. *Mahadgauda*[7] took the same view. In *Sangapa* v. *Vyasapa*[8] the Court (Bayley and Fulton, JJ.) was asked to hold that the mother's authority was at an end when the son dies unmarried after attaining full age and ceremonial competency. But it declined to lay down such a proposition. In *Ram Soondur Singh* v. *Surbanee Dossee*[9] the second adoption was made after the first adopted son had lived twelve years and it was contended that the second adoption was invalid because the first adoption had served all religious purposes. This contention, however, was disallowed on the ground that the continuance

(1) (1875) 8 M. H. C. R. 108.
(2) (1877) 2 Cal. 295 at p. 307.
(3) (1895) 20 Bom. 250.
(4) (1894) 19 Bom. 331.
(5) (1892) 17 Bom. 164.
(6) (1898) 23 Bom. 327.
(7) (1896) 22 Bom. 416.
(8) (1896) P. J. 528.
(9) (1874) 22 Cal. W. R. 121.

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of spiritual purposes was not exhausted by the first adoption. The second adoption was necessary to perform those rites which had to be repeated every year. The attainment of ceremonial competency by reason of investiture or marriage of the first son, whether natural or adopted, could not dispense with this necessity of second adoption to continue these rites. As has been shown above the sacra represent not only the idols in the place of worship, but also the rites and the services to the manes which have to be performed in memory of the father at least twice a year though not more. The argument of ceremonial competency is thus without much force. Spiritual efficacy of worship and oblation really represent the services the son has to render to his father all his life and that makes it necessary for the widow to adopt when her son dies without issue. The mention of investiture, marriage or competency as limitations on the widow's power has reference more to the ceremonial law than to the civil law as administered by the Court, and the whole current of recent decisions has been to base this limitation solely on the question whether the widow's act of adoption derogated from her own rights or the vested rights of others. The vested rights of no other relations were affected by Tulsawa's adoption of the plaintiff.

We therefore confirm the decree of the Lower Court and dismiss the appeal with costs.

*Appeal dismissed.*

## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

1900.
*November 5.*

LAKSHMAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* ANTAJI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Land Revenue Code (Bombay Act V of 1879), secs. 119, 120 and 121—Boundary dispute—Settlement of such dispute by Collector—Civil Court's jurisdiction—Jurisdiction.*

Section 121 of the Land Revenue Code (Bombay Act V of 1879) must be read along with sections 119 and 120 of the Code.

It is only when a boundary dispute arises between the owners of adjoining lands, and the Collector is called upon to determine the dispute, that his determi-

* Second Appeal, No. 346 of 1900.

nation becomes final under section 121 of the Code so as to oust the jurisdiction of the Civil Court.

SECOND appeal from the decision of Ráo Bahádur Mahadeo Shridhar, First Class Subordinate Judge, A.P., of Ratnágiri, reversing the decree of Ráo Sáheb K. H. Kirkire, Second Class Subordinate Judge at Vengurla.

Plaintiff Lakshman Narayan Kamat was the owner of a plot of land (Survey No. 658) and the defendants Antaji Yashwant and others were owners of a neighbouring plot (Survey No. 650).

Survey No. 658 lay to the west and Survey No. 650 to the east of a public road which ran between the two plots of land.

At the time of the survey settlement no dispute was raised before the survey officers as to the boundaries of these plots.

The plots in dispute were situate on the east of the public road, *i. e.* on the side of defendants' land.

In 1896 plaintiff sought to recover possession of the plots in dispute as forming part of his land, alleging that he had been dispossessed of them by defendants in 1889.

Defendant No. 1 denied the alleged dispossession and contended (*inter alia*) that the plots in dispute were included within the boundaries of his land and had been in his possession for more than twelve years.

Defendants Nos. 2 to 4 did not contest the suit.

The Court of first instance awarded plaintiff's claim, holding that the boundary marks had not been correctly laid down at the time of the survey and that the plots in dispute belonged to plaintiff.

This decree was reversed, in appeal, by the First Class Subordinate Judge, A.P., of Ratnágiri, who held that the dispute being substantially a boundary dispute, the Court had no jurisdiction to entertain the suit under section 121 of the Land Revenue Code (Bombay Act V of 1879).

Against this decision plaintiff preferred a second appeal to the High Court.

*V. G. Bhandarkar* for appellant (plaintiff).

Ráo Bahádur *G. N. Nadkarni* for respondent No. 1 (defendant No. 1).

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RANADE, J.:—In this case the original claim was for possession and profits of certain plots of land which plaintiff claimed fell within his thikán and the defendant said were included in his thikán. The defendant did not urge in the first Court that the dispute was really a boundary dispute.

Both the lower Courts held it proved that the plots in dispute, as settled by the survey map, fell within respondent's No. 650, and not appellant's No. 658. The first Court, however, held that the survey boundary marks were not correctly laid down at the time of the survey, and it decided, on the evidence, that the plots in dispute belonged to the plaintiff-appellant before us. In appeal the lower Appellate Court held that as the dispute was really a boundary dispute, the decision of the survey officer was final under section 121 (Land Revenue Code), and it accordingly dismissed the claim.

There can be no doubt that the lower Appellate Court was in error in holding that the present case fell under section 121, Land Revenue Code. Section 121 must be read along with sections 119, 120. There must be a boundary dispute between the owners of neighbouring numbers, and when there is such a dispute the law gives power to the Collector to make a final determination of the dispute with the help of the survey record and other evidence. There is nothing in this case to show that any dispute was thus raised before the survey officers when the survey map was prepared, nor was there any dispute raised which the Collector had to adjudge under section 121. The lower Appellate Court's view, therefore, of the application of section 121 to this case is obviously mistaken. The cases cited in the judgment presuppose that there had been a settlement by the Collector, either proved or alleged by the parties. As the present dispute has now been going on over twelve years, we do not think it will be fair to dismiss the claim as suggested by the respondent. Following the decisions in *Krishnarav Sitaram Paranjpe* v. *Lakshman Ganoji More*,[1] *Bala bin Joti Shirke* v. *Nana bin Dhulappa Hunargi*,[2] *Trimbak Narayan Palekar* v. *Joseph Braz D'Souza*,[3] we think that we must reverse the decision of the lower Appellate Court,

(1) (1883) P. J. p. 191. (2) (1898) P. J. p. 41,
(3) (1890) P. J. p. 152.

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and in remanding the case we direct it to ascertain if there has been any decision by the Collector under section 121 and decide the case accordingly. If there has been no such decision, it should require the plaintiff-appellant to apply to the Collector, and secure a decision of that officer, and then the lower Appellate Court should dispose of the case. The costs will depend upon the final decision, and must be settled by the lower Appellate Court.

*Decree reversed and case remanded.*

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## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

1900.
*November* 19.

THE ANKLESVAR MUNICIPALITY (ORIGINAL DEFENDANT), APPELLANT, *v.* RIKHAVCHAND KAPURCHAND (ORIGINAL PLAINTIFF), RESPONDENT.*

*Municipality—Bombay District Municipal Act (VI of 1873), secs. 17, 48 and 64—Street—Public street—Street lighted and swept by Municipality.*

The mere circumstance that a street is lighted and swept by a Municipality is not of itself sufficient to convert a private into a public street.

SECOND appeal from the decision of Ráo Bahádur Krishnamukh A. Mehta, Acting First Class Subordinate Judge, A.P., of Broach, reversing the decree of Khán Sáheb J. E. Modi, Second Class Subordinate Judge at Anklesvar.

Plaintiff Rikhavchand Karpurchand was owner of a house situate in the Mewára Falia Street at Anklesvar. In front of this house he had an *otla* abutting on the street.

The street contained about fifty houses. It was open at one end only. At this end there was a gate which was closed at night by the residents of the street.

The street, however, was lighted and swept by the Municipality.

On the 26th of March, 1896, the Municipality removed the *otla* from the front of the plaintiff's house, on the ground that it was an encroachment on a public street.

* Second Appeal, No. 139 of 1900.

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The plaintiff thereupon sued for damages and for an injunction restraining the Municipality from obstructing him in rebuilding the *otla*. He alleged that the street was a private street; that the land underneath the *otla* belonged to him; and that the Municipality had no authority to remove the *otla*.

The Municipality contended (*inter alia*) that the street was a public street and that they were justified in removing the *otla* as it was an encroachment.

The Court of first instance held that the land on which the *otla* stood did not belong to the plaintiff, but was part of a public street. The suit was therefore dismissed.

In appeal this decree was reversed by the First Class Subordinate Judge, A.P., who held that the street was a private street and that the Municipality had no authority to remove the *otla*.

Against this decision the Municipality preferred a second appeal to the High Court.

*H. C. Coyaji* for appellant (defendant).

*K. M. Jhaveri* for respondent (plaintiff).

RANADE, J.:—The principal contention in this case is whether the street in question is a public or a private street, and whether the piece of land on which the *chora* stood, and from which it was removed by the order of the appellant-defendant, belonged to the plaintiff or was public land.

The respondent-plaintiff's case was that in the Mewára Falia Street in Anklesvar he had a house of his own. Near that house there was a piece of land on which he had built a *chora* or *otla*, and this *otla* was removed by order of the Municipality of Anklesvar in March, 1896. The Municipality contended that the plot of land was public property, being part of a public street on which plaintiff had no right to build an *otla*, which was therefore removed as an encroachment. The Court of first instance held that the land did not belong to the plaintiff and that it was a part of a public street. It accordingly disallowed plaintiff's claim. In appeal these findings were reversed, and it was held that the land belonged to the plaintiff and did not form part of a public street.

In second appeal the principal point before us is whether the street was public or private, for if it was a public street, the land in dispute would not belong to the plaintiff. For the appellant-Municipality it was contended that the street was public, because though it was a *pol* which did not open on the other side, municipal sweepers were employed in sweeping the street, which contained some fifty houses in all, and that the Municipality kept up lamps in that street, and that the permission of the Municipality was asked for the erection of *mandawas*. It was further contended that the public generally had a right to pass and re-pass in that street, and a step put up by the plaintiff was removed by the order of the Municipality so far back as 1878.

On the other hand it was contended for the respondent that the sweepers were paid by the residents of the houses and that fixing lamps in the street did not make it public property. As it was a *pol* shut up at the other end it was not public property, but belonged to the residents. It was further urged that in 1887 a complaint was made to the Municipality in respect of this *otla*, and inquiries were made, and the Municipality declined to interfere.

Looking at this conflict of evidence it is clear that the lower Appellate Court had ample justification for the view it took that the street in dispute was a private and not a public street. The circumstances of the case resemble those in *The Ahmedabad Municipality* v. *Manilal Udenath*[1] and *Manecklal Motilal* v. *The Municipal Commissioner for the City of Bombay*,[2] except that no paid watchman is kept by the residents at the gate, which is, however, closed at night by the last comer. The mere circumstance that the street is lighted or swept by the Municipality is not of itself sufficient to convert a private into a public street. The number of instances where a permission was asked for the erection of a *mandawa* are few and far between. There is no record as to where the step, ordered to be removed in 1878, stood. The Municipal Act makes a clear distinction between "street" and "public street." Sections 45, 46, 50, 51, 53, 54 refer to streets generally, while sections 47, 48, 64, 17 refer to public streets.

(1) (1895) 20 Bom. 146. (2) (1894) 19 Bom. 407.

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ANKLESVAR MUNICIPALITY v. RIKHAVCHAND.

It is only public streets which are vested in the Municipality, while over private streets the Municipality may exercise certain powers, but the property in land in those streets does not necessarily belong to the Municipality.

The fact that the Municipality declined to take any action to remove the *otla* in 1887 strengthens the view taken by the lower Appellate Court. We have arrived at this conclusion independently of the evidence of the alleged mortgage and release. The Court of first instance held that the mortgage was proved, but that the land was not identified. The lower Appellate Court held the identification proved. If it was necessary for us, in the view taken above, to find on this point we should be inclined to think that these documents were not altogether free from suspicion, and the identification was not satisfactory. It is, however, not necessary to come to any finding on these points to support the decision of the lower Appellate Court. The street is not proved to be a public street and plaintiff-respondent has been in possession of the *chora* from 1887 as his own property with the knowledge of the appellant-defendant. The burden of proof lay on the appellant under the circumstances, and it failed to justify its conduct in removing the *otla*. We must therefore dismiss the appeal with costs.

*Appeal dismissed.*

## *FULL BENCH.*

## APPELLATE CIVIL.

*Before Mr. Justice Candy, Mr. Justice Ranade, Mr. Justice Crowe and Mr. Justice Whitworth.*

1900. *November* 21.

DEORAV AND OTHERS (ORIGINAL DEFENDANTS), APPELLANT, *v.* NARAYANDAS HARAKCHAND (ORIGINAL PLAINTIFF), RESPONDENT.*

*Land Revenue Code (Bombay Act V of 1879), secs. 4, 13, 15, 18, 19 and 20—Mámlatdárs' Courts Act (Bombay Act III of 1876), sec. 3—Mámlatdár—Substitute designated under the Land Revenue Code—Exercise of the powers of Mámlatdár.*

A substitute designated under section 15 of the Land Revenue Code (Bombay

* Application No. 119 of 1900 under Extraordinary Jurisdiction.

Act V of 1879) cannot exercise the powers conferred by the Mámlatdárs' Courts Act (Bombay Act III of 1876) on the Mámlatdár to whose office he has temporarily succeeded.

APPLICATION under the extraordinary jurisdiction of the High Court (Civil Procedure Code, Act XIV of 1882, section 622,) against the decision of Ráo Sáheb Krishnaji Vasudeo Natu, acting Mámlatdár of Sholápur, in a possessory suit.

The plaintiff brought a possessory suit in the Court of the Mámlatdár of Sholápur. While the proceedings were going on, the Mámlatdár was transferred to another district. Pending the arrival of his successor the Collector appointed one Krishnaji Vasudeo Natu, a clerk in his office, to act as Mámlatdár, and he decided the suit in plaintiff's favour.

The defendants applied to the High Court under its extraordinary jurisdiction contending that the acting Mámlatdár had no jurisdiction to try the suit, inasmuch as he was not invested with the powers of a Mámlatdár under the Mámlatdárs' Courts Act (Bombay Act III of 1876). A rule *nisi* was granted calling on the plaintiff to show cause why the decision of the acting Mámlatdár should not be set aside.

*Ganpat S. Mulgaokar* for the applicants (defendants) in support of the rule.

*Mahadeo B. Charbal* for the opponent (plaintiff) showed cause.

JENKINS, C.J.:—The Mámlatdár of Sholápur having vacated his office, a subordinate, designated by an order issued in this behalf by the Collector under section 15 of the Bombay Land Revenue Code, 1879, succeeded temporarily to the Mámlatdár's office. The sole question for our determination is, whether this subordinate during his temporary tenure of office was competent to exercise the judicial functions vested in a Mámlatdár by the Mámlatdárs' Courts Act, 1876.

Section 3 of this Act provides that "the word 'Mamlatdar' shall include any revenue officer ordinarily exercising the powers of a Mámlatdár and any other person who may be specially authorized by the Governor in Council to exercise the powers of a Mámlatdár." It has been argued before us that a temporary incumbent does not come within this definition; because he does

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not *ordinarily*, but *extraordinarily*, exercise the powers of a Mámlatdár. This argument has the sanction of a decision of this Court in *Ningapa* v. *Dodapa*[1]; but for this we should have held the argument to be unsustainable. In the first place it appears to us that a force is ascribed to the words "ordinarily exercising" that does not belong to them: in our opinion they are merely used in contrast with the words "specially authorized." But apart altogether from this, the argument gives the go-by to the very specific terms of the Bombay Land Revenue Code, 1879. By section 15 of that Act the temporary incumbent "shall be held to be the Mámlatdár under this Act." By section 20 it is provided that "the appointment of all officers mentioned in sections 4 to 13 and 18 and 19 shall be duly notified. Any officer appointed to act temporarily for any such officer shall exercise the same powers and perform the same duties as might be performed or exercised by the officer for whom he is so appointed to act." It is clear that a subordinate appointed under section 15 is an officer appointed to act temporarily within the meaning of this section; and when we turn to section 12 we find that a Mámlatdár's "duties and powers shall be such as may be expressly imposed or conferred upon him by this Act or by any other law for the time being in force." Therefore we see no escape from the conclusion that the designated subordinate can, and shall, exercise the powers vested in the Mámlatdár by the Mámlatdárs' Courts Act, 1876.

We have been referred, in the course of the argument, to the collected opinions of a former Legal Remembrancer; they are interesting rather than authoritative; nor is their value enhanced by the fact that the writer of these opinions was the draftsman of the Act.

The decision, however, to which we have alluded, places a real difficulty in the way of our giving effect to the opinion we have formed, and it is for this reason that we refer to the Full Bench the following question:—

Can a substitute designated under section 15 of the Bombay Land Revenue Code, 1879, exercise the powers conferred by the

(1) (1896) 21 Bom. 585.

Mámlatdárs' Courts Act, 1876, on the Mámlatdár to whose office he has temporarily succeeded?

The case being thus referred, it was heard by a Full Bench consisting of Candy, Ranade, Crowe and Whitworth, JJ.

*Ganpat S. Mulgaokar* for the applicants (defendants) in support of the rule:—The point is whether the temporary appointment of a Mámlatdár invests him with the powers of a Mámlatdár under the Mámlatdárs' Act. We submit that he is not a Mámlatdár under the Act: see section 3. The question turns upon the construction to be put on the words "ordinarily exercising the powers of a Mámlatdár" in the section. A temporary appointment is a special appointment and the person so appointed cannot be said to be ordinarily exercising the powers of a Mámlatdár. Section 12 of the Land Revenue Code refers to the duties of a Mámlatdár. Section 15 of the Code refers to the filling up of a temporary vacancy, and the expression "under this Act" in the section shows that the Mámlatdár is Mámlatdár for revenue administration. When a person is appointed as an acting Mámlatdár, he must be so appointed by the Commissioner and his appointment must be notified in the Government Gazette. A subordinate officer in the Collector's office can be appointed temporarily for purposes of revenue as a Mámlatdár by the Collector without the sanction of the Commissioner, and his appointment need not be notified. Further, section 20 of the Code also refers to the appointment of a Mámlatdár. In the present case the acting Mámlatdár was not a Mahálkari, but he was a clerk in the Collector's office. Thus sections 15 and 20 show what is the difference in an acting Mámlatdár and a Mámlatdár temporarily appointed. A temporary appointment, such as the one in question, does not carry with it the powers conferred by the Mámlatdárs' Act—*Ningapa* v. *Dodapa*.[1] See Batty's Rules, page 518. The appointment contemplated by the latter part of section 3 of the Mámlatdárs' Act is the appointment made by Government.

*Mahadeo B. Chavbal* for the opponent (plaintiff) to show cause:—In the former Acts relating to possessory suits, the func-

(1) (1896) 21 Bom. 585.

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tions of Mámlatdár were not defined, therefore any revenue officer could take cognizance of such suits. The duties of Mámlatdár were defined in the Land Revenue Code of 1879. The word "ordinarily" in section 3 of the Mámlatdárs' Act is used in contrast to "specially." A Mahálkari is not a person ordinarily exercising the powers of a Mámlatdár. He is a revenue officer, and if he has to decide a possessory suit he must be specially invested with that jurisdiction, that is, he must be a Mámlatdár for the purpose of the suit. The word "Mámlatdár" was for the first time used in a definite sense in the Land Revenue Code of 1879. Formerly the terms used were Mahálkari, Kamávisdár, &c., but the Code of 1879 has made the meaning clear. Sections 12, 15 and 20 of the Code when read together show that a temporary appointment of a Mámlatdár carries with it the powers conferred upon the officer ordinarily exercising the powers of a Mámlatdár under the Mámlatdárs' Act.

[CANDY, J.:—But in the present case there was no delegation by the Collector of the duties conferred by that Act.]

The acting appointment was made by the Collector under section 15 of the Land Revenue Code. That section is an enabling section and it empowers the Collector to act in an emergency. A Mámlatdár so appointed is a Mámlatdár under section 12 of the Code. Section 20 of the Code also shows that sections 12 and 15 should be read together.

The expression "ordinarily exercising the powers of a Mámlatdár" in section 3 of the Mámlatdárs' Act means exercising the powers which a Mámlatdár usually has. The presumption is that a person who is designated as holding a public office discharges the duties which appertain to that office. In the present case the Mámlatdár has styled himself acting Mámlatdár, and therefore the presumption is that he is discharging the duties of a Mámlatdár. It was argued that as the appointment was not gazetted, the acting Mámlatdár was not competent to discharge the duties of a Mámlatdár. When a Collector makes a temporary appointment under section 15 of the Land Revenue Code, there is nothing to prevent him from notifying such appointment in the Gazette. The notification of the appoint-

ment is not, we submit, the test to decide whether the person appointed Mámlatdár is ordinarily exercising the duties of a Mámlatdár.

*Mulgaokar* in reply.

The judgment (Candy, Ranade and Crowe, JJ.) was delivered by

CANDY, J.:—The question referred is—can a substitute designated under section 15 of the Bombay Land Revenue Code, 1879, exercise the powers conferred by the Mámlatdárs' Courts Act, 1876, on the Mámlatdár to whose office he has temporarily succeeded?

In our opinion the answer to the question does not depend upon what powers had been conferred by the Mámlatdárs' Courts Act, 1876, on the Mámlatdár to whose office the substitute has temporarily succeeded. The answer depends simply upon the further question whether the "substitute" comes within the interpretation clause, section 3, of Bombay Act III of 1876. The provisions of that section may be shown thus:—

The word "Mámlatdár" shall include

1, any revenue officer ordinarily exercising the powers of a Mámlatdár, and

2, any other person (*a*) who may be specially authorised by the Governor in Council to exercise the powers of a Mámlatdár under this Act, or

(*b*) who at the time of the framing of this Act is duly authorised to exercise the powers of a Mámlatdár under Bombay Act V of 1864.

It must be remembered that in 1876, when the Mámlatdárs' Courts Act was passed, the Land Revenue Code was not in existence. The intention of the Act of 1876 was to bring into one consolidating and amending Act so much of the old law (Act XVI of 1838 and Act V of 1864) and such new law as appeared necessary for the continued regulation of the existing Courts—(*Bai Jamna* v. *Bai Jadav*).[1] Turning to Bombay Act V of 1864 we find that the interpretation clause (section 20) ran thus: "The powers of a Mámlatdár under this Act may be exercised

(1) (1879) 4 Bom. 163 at p. 170.

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by any revenue officer possessing powers corresponding to the powers of a Mámlatdár as defined in Chapter II of Regulation XVI of 1827, or by any other person who may be specially authorised by the Governor in Council to exercise the powers of a Mámlatdár under this Act." It will be observed that the contrast is between "any revenue officer" and "any other person;" and as there were obvious objections to the phrase "possessing powers corresponding to the powers of a Mámlatdár," the language of the interpretation was changed in the amending Act III of 1876, as shown above. The contrast, again, is between the revenue officer who exercises the powers of a Mámlatdár and any other person who is specially authorised &c. But the framers of Bombay Act III of 1876 did not say simply "any revenue officer exercising the powers of a Mámlatdár." If they had, there would have been no difficulty. But they inserted the word "ordinarily," and either this word must be a mere surplusage, intended simply to denote that the revenue officer must be one who exercises the ordinary powers of a Mámlatdár, or else it must be inferred that the Legislature had a special object in inserting the word, the intention being that the judicial duties under the Act of 1876 should not be exercised by any inexperienced revenue subordinate, who might in cases of emergency be placed in temporary charge of a Mámlatdár's office, and who would thus be exercising the powers of a Mámlatdár, though he would not in the ordinary sense of the term be a Mámlatdár. The reasonableness of such an intention is patent. And this is the view which was apparently taken of the intention of the Legislature in *Ningapa* v. *Dodapa*[1] by the late Sir C. Farran, C.J., and Parsons, J.

This interpretation of section 3 of Bombay Act III of 1876 is not affected by the subsequent Act V of 1879 (Land Revenue Code), chapter II of which refers to the constitution and powers of revenue officers. No doubt under section 15 the subordinate succeeding temporarily to the Mámlatdár's office "shall be held to be the Mámlatdár under this Act until the Mámlatdár resumes charge or until such time as a successor is duly appointed and

(1) (1896) 21 Bom. 585.

takes charge of his appointment." But a distinction is apparently drawn in the Act between an Acting Mámlatdár appointed by the Commissioner, the appointment being duly notified, and the case of a subordinate succeeding temporarily to the Mámlatdár's office under section 15. The latter appointment is not notified, section 15 not being mentioned in section 20. Of course the Commissioner may accept the Collector's nomination and then the appointment of the substitute would be duly notified and the officer so appointed would no doubt have jurisdiction under the Mámlatdárs' Act. Such a course would be obvious in the case of a vacancy likely to last for any time. But in the case of a substitute temporarily succeeding to the office as contemplated in section 15, there might be no necessity for such an appointment; and equally there would be no necessity for such substitute having jurisdiction under the Mámlatdárs' Courts Act. So there is no argument on the score of inconvenience. On the contrary, as shown above, the inconvenience would be in giving such a substitute the judicial powers under Bombay Act III of 1876.

Having regard, then, to the fact that the matter is not *res integra*, and that the question has already been judicially decided by this Court, and that we are not prepared to dissent from that decision, which receives some support from the language of the Act and from the apparent intention of the Legislature, we answer the question referred to us in the negative.

WHITWORTH, J.:—Bombay Act V of 1879, which deals with the administration of land, is concerned with the Mámlatdár only as a revenue officer. Bombay Act III of 1876 makes a certain limited use of the Mámlatdár as a judicial officer. In so doing it seems to me in section 3 to carefully restrict the judicial office to such officers, among Mámlatdárs, as have been deemed fit to exercise a Mámlatdár's powers *ordinarily*, and to exclude mere temporary officiators. The distinction appears natural: it is necessary that the multifarious duties of a Mámlatdár under Act V of 1879 should be carried on, somehow, without a break, however ill qualified the substitute may be; it is *not* necessary that the judicial function under Act III of 1876 should be so continued. On the contrary, it is far better that cases under that Act should be suspended during the absence of the duly

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qualified Mámlatdár and pending his return or the appointment of a successor.

That the Land Revenue Code is later in date than the Mámlatdárs' Act, does not affect this view. The framers of the Code in 1879 must have been aware of the special limitation imposed by section 3 of the earlier Act for its purposes; and they left it undisturbed while they made provision for vacations of office under the Code for its purposes. Section 20 of the Code provides in its second clause that temporary officiators shall exercise the same powers as the officers for whom they act. But this is still for the purposes of the Code, and the exception provided by section 3 of the Mámlatdárs' Act is still undisturbed. Indeed the second clause of section 20 of the Code is shown by its position to be only in the nature of a proviso or exception to the main clause which deals only with the question of the *notification* of appointments.

Section 12 of the Code again provides that a Mámlatdár's "duties &c. shall be such as may be expressly imposed &c. by this Act *or by any other law* for the time being in force." But while this defines a Mámlatdár's ordinary duties it does not, I think, imply that the special limitation provided with reference to the judicial function to be discharged under Act III of 1876 should cease to have effect.

Following the ruling in *Ningapa* v. *Dodapa*[1] I would answer the question referred in the negative.

The question referred being answered in the negative, the rule was mad absolute with costs.

*Rule made absolute.*

(1) (1896) 21 Bom. 585.

# APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

MAHAMAD HAJI ZAKERIA, APPELLANT, *v.* AHMADBHAI HABIBBHAI, OPPONENT.*

1900. *November* 22.

*Practice—Procedure—Reference to High Court—Civil Procedure Code (Act XIV of 1882), secs. 539, 617, 647.*

M, claiming to be a trustee or manager of a mosque, applied to the District Judge for permission to grant a lease of lands belonging to the mosque. In response to a proclamation issued, A, the opponent, appeared before the District Judge claiming to be the owner of the village in which the lands were situate and contended that the lands did not belong to the mosque and that the applicant was not the manager. The District Judge felt a doubt as to whether he had jurisdiction to entertain the application unless a suit was properly framed and filed under section 539 of the Civil Procedure Code (Act XIV of 1882), and referred the point to the High Court under section 617 of the Code.

The High Court refused to answer the reference, being of opinion that no reference under section 617 could be made on such an application. Sections 617 and 647 of the Civil Procedure Code apply when doubts arise in the proceeding of a suit or appeal or execution or other proceeding. Section 617 was not intended to provide for suppositious cases which do not naturally arise in a proper proceeding before the Court.

REFERENCE by R. S. Tipnis, District Judge of Thána, under section 617, read with section 647 of the Civil Procedure Code (Act XIV of 1882).

The reference was made in the following terms:—

One Mahamad Haji Zakeria made an application to the District Court at Thána for permission to lease in perpetuity certain land alleged to have been granted to, and set apart for the purposes of, a masjid by his ancestors. It is alleged by the applicant that the land at present yields less than Rs. 10 per annum, but there are offers of an annual rent of Rs. 240 if it is granted in permanent lease. He further alleges that according to Mahomedan law sanction of the Kazi or, in his absence, the Court is necessary to validate a permanent lease of masjid property.

My predecessor, Mr. M. B. Tyabji, registered this application, and, in pursuance of his order passed on 9th December 1899, a proclamation was issued and published by beat of drum in the village in which the land is situate, calling upon any one interested in the mosque to file objections to the proposed lease, and

* Civil Reference, No. 16 of 1900.

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announcements to the same effect were published in the local paper and in another newspaper of Bombay.

One Ahmadbhai Habibbhai, by his attorney, Hari Krishna, filed objections, alleging that he is the owner of Málád, wherein the land in question is situate and that this land is not shown in village papers as pertaining to the mosque; that the applicant has no right to grant it in lease, and that any such proposed lease may injure the interests of the masjid.

The applicant filed two affidavits to prove that the proposed permanent lease would be beneficial to the masjid.

When this case came before me for disposal, I felt doubts as to the jurisdiction of the District Court to entertain an application of this nature. Mr. Joglekar for the applicant argued the case before me and desired me to refer the matter to their Lordships if I had any doubts as to this Court's jurisdiction.

I suppose, for the sake of argument, that this land in question is wakf property set apart for the purposes of a mosque, and that the applicant is the legal or *de facto* manager of it. I further assume for a moment that it is competent to a manager like the applicant to grant a lease of such cultivable land for building purposes for the benefit of the mosque, and that for a lease of a longer term than three years, advantage to the mosque should be proved and the sanction of the Kazi should be obtained (The Law relating to Gifts, Trusts, &c., among the Mahomedans by Mr. Syed Ameer Ali, page 270).

For Málád there is no Kazi appointed by Government. It has been urged that the function of the Kazi in this respect ought to be exercised by the District Court. I think that the District Court, as representing the Crown's judicial authority, is competent to grant sanction in such cases, but I doubt very much if the sanction may be sought for in this summary manner by an application.

Section 539 of the Civil Procedure Code provides, *inter alia*, that whenever the direction of the Court is deemed necessary for the administration of any trust created for public religious purposes (the present wakf property comes under that denomination), a suit may be filed in the District Court by certain persons specified in that section to obtain a decree for (amongst other reliefs) authorizing the whole or any part of its property to be let, sold, mortgaged or exchanged. It is this procedure which the applicant should adopt.

It has been argued that there is practically no opposition of this kind and therefore there can be no defendants in the suit: but a friendly suit in which some of the interested persons appearing as defendants is often resorted to. In the present case, however, Ahmadbhai is sure to be a defendant, for he has objected to this petition.

* * * * * *

I have ventured to make this reference as my predecessor took cognizance of the case, and there is no appeal against any order that I may pass in regard to want of jurisdiction; and, lastly, I have some reasonable doubts on this point.

The point I refer for their Lordships' opinion is whether the District Court has jurisdiction to entertain an application of this nature without a suit properly framed and filed under section 539 of Civil Procedure Code.

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MAHAMAD HAJI ZAKERIA v. AHMADBHAI HABIBBHAI.

*Chintaman A. Rele* (*amicus curiæ*) for the applicant.

*Ganpatrav S. Mulgaumkar* (*amicus curiæ*) for the opponent.

RANADE, J. :—In this case the reference is made by the District Judge under section 617 of the Civil Procedure Code in the matter of an application made by a certain person who claims to be a trustee or manager of a mosque, and has sought the permission of the District Judge to grant certain lands described as belonging to the mosque on a long lease. The application was made to the District Judge, because the applicant was advised that, in the absence of a Kazi, the District Judge was the proper party to give the sanction.

In response to a proclamation issued, an opponent appeared before the District Judge, and claiming to be owner of the village, contended that the land did not belong to the mosque, and that the applicant was not manager. The District Judge made this reference, because he felt a doubt as to whether section 539 of the Civil Procedure Code did not lay down the proper procedure to follow.

We do not think that a reference under section 617 or 647 can be made merely on an application of this sort made to the District Judge who took no further action in the matter. Sections 617 and 647 apply when doubts arise in the hearing of a suit or appeal or execution or other proceeding. The District Judge assumes that the applicant is Mutwalli or trustee, and that the land is wakf property—both which positions are directly contested by the opponent. Section 617 was not intended to provide for suppositious cases which do not actually arise in a proper proceeding before the Court. Section 539, clause (*d*), provides for cases where trustees seek directions in the matter of the management of a trust, but until in a properly instituted proceeding between applicant and opponent the case comes up regularly before the Court, we do not think we are called upon to deal with such a reference under section 617. It was admitted that there has been no precedent of any such application as that made to the District Judge in this case. For these reasons we return the reference unanswered.

*Order accordingly.*

## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

1900. *November 22.*

KALIANDAS PANDUDAS, PLAINTIFF, *v.* LOTU, DEFENDANT.*

*Limitation Act (XV of 1877), sec. 19, explanation I—Acknowledgment—Accounts.*

Under section 19, explanation I, of the Limitation Act (XV of 1877), it is open to the plaintiff by reference to the accounts or otherwise to establish a connection between two accounts (khátas), and show that the later one was an acknowledgment of the debt due under the first.

REFERENCE by Ráo Sáheb Sadashiv Bapuji Gadgil, Subordinate Judge of Erandol in the Khándesh District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The plaintiff filed this suit on the 13th August, 1900, on a *ruzu kháta* (settled account), dated 13th August, 1894, to recover Rs. 20 from the defendant. He contended that this suit was not barred by limitation. The defendant having executed another *ruzu kháta* on the 12th August, 1897, for Rs. 16-4-0, that being the amount then due.

The defendant did not appear.

The suit being cognizable by the Subordinate Judge in his Small Cause Jurisdiction, there was no appeal under the Provincial Small Cause Courts Act (IX of 1887), and as he was doubtful as to whether the *kháta* of the 12th August, 1897, had the effect of taking the case out of the statute of Limitation (Act XV of 1877), he submitted the following question for decision :—

"Whether the later kháta for Rs. 16-4-0 should be held sufficient for giving a fresh start to limitation for the plaintiff's claim on the previous loan of Rs. 10 ?"

The Subordinate Judge was inclined to answer the question in the affirmative.

In the reference he made the following observations :—

The copies of the two khátas are put in by plaintiff on a single piece of paper (Exhibit 4); but the original khátas are not written thus one above the other on the same paper. They are contained in two separate books, each

* Civil Reference, No. 17 of 1900.

being written in the plaintiff's ruzu kháta book for the then current year of the Samvat era. The books were produced in Court for proof of the original khátas.

Though the plaintiff states in the plaint that the later kháta for Rs. 16-4-0 was executed for the balance found due at that date on the previous loan of Rs. 10, there is nothing in the document itself to show that it was executed for an old debt; on the contrary, the debtor's signature is followed by words to the effect that he received Rs. 16-4-0.

Creditors often get documents executed by their debtors which purport to be executed for cash advances but are really executed for old balances. In the present case the balance due on the loan of Rs. 10 at the date of later kháta was executed really for the old balance as plaintiff alleges and not for cash as it purports to be.

* * * * * * * *

Explanation I added to section 19 of the Indian Limitation Act, 1877, does not appear to me applicable to the present case, for in the document in question there is no vagueness at all; it clearly purports to be executed for a fresh advance and mentions no old debt at all.

Creditors, I think, are not actuated by any fair motive in requiring needy debtors to execute such false documents, so that the creditors may be able to set up the documents as executed for cash advances when it might serve their purpose to do so. I therefore consider the practice an unfair one.

On the other hand, if effect is to be given to the real intention of the parties, the document in question must be treated as an acknowledgment for the old balance, and neither party will be put to any loss by so doing.

However, having regard to the unfairness of the practice, I am in doubt whether such documents should receive any other than a strict construction.

There is no injustice in rejecting a claim even on a purely technical ground like limitation; but then the validity of the ground should be beyond doubt. In case of doubt, I should prefer to do justice in the ordinary and non-technical sense of the term; and this can be done in the present case by holding plaintiff's claim to be not time-barred.

*Vasudev G. Bhandarkar* (*amicus curiæ*) for the plaintiff.

*Ramdatt V. Desai* (*amicus curiæ*) for the defendant.

RANADE, J.:—We agree with the Subordinate Judge in his view that under section 19, explanation I, Limitation Act XV of 1877, it is open to the plaintiff by reference to the accounts or otherwise to establish a connection between the two khátas, and show that the later one was an acknowledgment of the debt due under the first.

*Order accordingly.*

# *PRIVY COUNCIL.**

P. C.
1900.
*June* 21, 22.
*July* 21.

PESTONJI MUNCHERJI MODY, PLAINTIFF, *v.* THE QUEEN INSURANCE COMPANY, DEFENDANT.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

*Privy Council—Practice—Civil Procedure Code (XIV of 1882), section 600—Certificate that appeal to the Privy Council involves a question of Law—Malicious prosecution—Question of malice and reasonable and probable cause—Concurrent findings of lower Courts.*

In an action for malicious prosecution in which the plaintiff claimed Rs. 3,00,000 as damages, the Court of first instance dismissed the suit, holding that the plaintiff had not proved either the existence of malice or the absence of reasonable and probable cause. The plaintiff appealed and the appeal Court dismissed the appeal on the same grounds, and on appeal to the Privy Council their Lordships also *held* that both as regards malice and the absence of reasonable and probable cause, the plaintiff had failed to discharge the burden of proof which lay upon him.

The case came before the Privy Council on a certificate granted by the High Court of Bombay that the appeal involved a substantial question of law. It appeared to their Lordships of the Privy Council that this certificate must have been granted under a misapprehension. The only question involved was a question of fact on which there were concurrent findings. According to English Law, it is for the Judge and not for the jury to determine what is reasonable and probable cause in an action for malicious prosecution. The jury finds the facts. The Judge draws the proper inference from the findings of the jury. In that sense the question is a question of law. But where the case is tried without a jury there is really nothing but a question of fact and a question of fact to be determined by one and the same person.

APPEAL from a decree (18th December, 1894) of the High Court affirming a decree (13th October, 1893) of the High Court in the original jurisdiction dismissing the suit.

The appellant, described as a Parsi merchant in Bombay, brought this suit on the 25th June, 1891, against the Queen Insurance Company, charging them with having, by their Secretary, falsely, maliciously and without reasonable or probable cause prosecuted him for cheating, on which charge he was committed for trial, tried before the Sessions Court, and acquitted on the 17th September, 1890.

* Present: LORDS HOBHOUSE, MACNAGHTEN AND LINDLEY, SIR RICHARD COUCH, and SIR HENRY DEVILLIERS.

The defendant company in their written statement traversed the plaintiff's allegations. Issues were framed accordingly. The suit was dismissed in the original jurisdiction of the High Court, and an appeal by the plaintiff was dismissed in the Appellate Court.

All the relevant facts in evidence, as well as the proceedings in the Indian courts, appear in their Lordships' judgment.

Leave to file this appeal was granted on the 12th July, 1895, a certificate being granted under section 600 of the Civil Procedure Code, 1882.

The appellant appeared in person.

*H. E. Duke*, Q.C., and *J. D. Mayne* appeared for the respondents.

Their Lordships' judgment was delivered on the 21st July, 1900, by

LORD MACNAGHTEN :—This is an appeal against an order of the High Court of Bombay which confirmed a decision of the same Court in the exercise of its original jurisdiction.

The action in which the decision was given was brought by the appellant, Mr. Mody, against the respondents, the Queen Insurance Company, to recover damages for alleged malicious prosecution.

The main facts are not in dispute. The appellant, a Parsi merchant trading in Bombay, had a large shop there in Apollo Street. The respondent company, whose principal place of business is in Liverpool, had a branch office at Bombay, where it was at the time represented by a Mr. Symington.

In February, 1889, Mr. Mody insured his goods in his shop in Apollo Street with the respondents for Rs. 40,000.

On the 11th of November, 1889, Mr. Mody's premises in Apollo Street were burnt down and a claim was made upon the Insurance Company for the full amount of the policy.

The investigation of the claim was entrusted to Messrs. Lidbetter and Young, fire adjusters. The investigation was conducted on the footing that Mr. Mody had only one shop in Bombay and that all documents evidencing his goods and their value at the date of the fire referred to goods in Apollo Street

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PESTONJI M. MODI v. THE QUEEN INSURANCE COMPANY.

or goods stored at the Prince's Dock where some heavy articles belonging to Mr. Mody, such as fire engines, were warehoused.

On the 9th of December, 1889, Messrs. Lidbetter & Co. reported that the goods destroyed by the fire exceeded Rs. 40,000 in value.

On the 12th of December, 1889, Mr. Symington prepared a cheque for Rs. 40,000, and wrote to Mr. Mody desiring him to call. The next morning Mr. Mody came. Some conversation took place about the loss. Mr. Symington questioned Mr. Mody and understood him to say in reply to specific inquiries that at the time of the fire he had no goods except those in the Apollo Street shop and those in Prince's Dock. Mr. Symington then wrote out a short and simple declaration to that effect. He read it to Mr. Mody. Mr. Mody read it himself and signed it and thereupon Mr. Symington handed over the cheque.

In May, 1890, Mr. Symington received information which led him to believe that the declaration was untrue. He made inquiries. He wrote to Mr. Mody on the subject and received an evasive reply from Mr. Mody's solicitors. Then having satisfied himself that the declaration was false Mr. Symington swore an information before the Chief Presidency Magistrate of Bombay. Mr. Mody was arrested and the matter was investigated at great length on several days in the police court. Mr. Mody made no explanatory statement before the Magistrate. All he said was that he was not guilty and that he wished to leave the matter entirely in his solicitor's hands. The Magistrate committed him for trial on a charge of cheating. He was tried before the Sessions Court and acquitted.

Nine months afterwards Mr. Mody brought this action against the Insurance Company charging them with having, by their Secretary, Mr. Symington, falsely, maliciously and without reasonable or probable cause prosecuted him on a charge of cheating. He claimed three lákhs of rupees as damages.

Parsons, J., who tried the case without a jury, dismissed the action with costs. He thought that Mr. Mody had not proved either the existence of malice or the absence of reasonable and probable cause.

Mr. Mody appealed and his appeal was dismissed with costs.

There is no note of the judgment of the Appeal Court, but from an endorsement on counsel's brief it appears that the Court took precisely the same view as the Judge of First Instance.

On his appeal before this Board Mr. Mody conducted his own case in person. He addressed the tribunal at some length and with much earnestness imputing partiality to his Judges and all sorts of misconduct to his opponents. Every line of evidence which he thought material was read. Their Lordships listened attentively to all that was read and to all that was urged on his behalf, but they are unable to find any reason for differing from the Courts below. They are satisfied that Mr. Mody had a fair and impartial hearing both before the Judge of First Instance and the Court of Appeal, and they think it perfectly clear that no Judge guided by the evidence could have come to any other conclusion.

Mr. Mody was acquitted of the charge made against him. It must therefore be taken that he was innocent. But that circumstance of itself goes very little way towards entitling him to a verdict on the issue raised in the present action. In order to succeed he must prove that the respondents acted maliciously, that is from some indirect motive, and that there was no reasonable or probable cause for their action. Evidence of malice there is absolutely none. In order to make out a case of malice it was alleged in the Court of First Instance that Mr. Symington himself knew right well that the declaration which he asked Mr. Mody to sign was untrue—a proposition in support of which there is not the slightest evidence, though Mr. Symington no doubt had some suspicion on the subject. The suggestion was that he entrapped Mr. Mody into signing the declaration in order that the Insurance Company might get into their hands a document which they could afterwards use as a means of extorting from Mr. Mody some portion of the money they were paying over to him. It is difficult to imagine a more absurd suggestion. Obviously Mr. Symington would not have handed over the cheque if he had known that the statement in the declaration was untrue. Mr. Mody did not repeat that ridiculous charge or insinuation before this Board. But he said that Mr. Symington had a personal grudge against him because he once refused to

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give Mr. Symington a horse which he wanted to get. There is not the slightest evidence in support of that story either. It is true that Mr. Mody made the allegation in his answers to interrogatories, but those answers are not evidence against the respondents. Mr. Mody did not say a word about it in his oral examination nor was Mr. Symington who was examined on commission, asked a single question on the subject.

In the Courts below it was held that Mr. Symington acted in good faith. Their Lordships are of that opinion also. Most of the evidence on which the prosecution relied in the Police Court broke down at the trial. But it is quite clear that Mr. Symington with the aid of the police and his solicitors took reasonable care to sift the evidence that was laid before him in support of the charge.

Mr. Mody does not deny that the declaration which he signed was false. His excuse is that he did not at that time understand English well enough to master its meaning. It is a very short document and very plain. It is difficult to suppose that Mr. Mody failed to understand it. The learned Judge who tried the case thought it more probable that Mr. Mody did understand the document, but that for some reason or other he attached very little importance to its contents.

Their Lordships agree with both the Courts below in thinking that there was no evidence to show that the prosecution was instituted without reasonable and probable cause. Both as regards malice and the absence of reasonable and probable cause the burden of proof lay upon Mr. Mody and he has not discharged it.

There is only one further observation which their Lordships desire to make. The case comes before them with a certificate that the appeal involves a substantial question of law. It appears to their Lordships that the only question involved is a question of fact on which there are concurrent findings. It is quite true that according to English law it is for the Judge and not for the jury to determine what is reasonable and probable cause in an action for malicious prosecution. The jury finds the facts. The Judge draws the proper inference from the findings of the jury. In that sense the question is a question of law. But where the case is tried without a jury there is really nothing

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but a question of fact and a question of fact to be determined by one and the same person. It appears to their Lordships that the certificate allowing the appeal to Her Majesty must have been granted under a misapprehension.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed.

The appellant will pay the costs of the appeal.

*Appeal dismissed.*

Solicitors for the respondent-company:—*Messrs. Payne and Lattey.*

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## *PRIVY COUNCIL.**

MALKARJUN (ORIGINAL DEFENDANT), APPELLANT, *v.* NARHARI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.

P. C. 1900. *June* 20, *July* 21.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

*Civil Procedure Code (Act X of 1877), sections 234, 248, 311—Execution—Decree—Death of judgment-debtor after decree but before execution—Sale in execution without notice to legal representatives—Notice given to wrong person—Title of purchaser at such sale—Sale irregular but not a nullity—Suit to set aside such sale must be brought within one year—Limitation Act (XV of 1877), art. 12.*

An account and redemption of a mortgage, effected in 1877, were refused where the mortgaged property had since then been sold at a judicial sale in execution of a decree. The plaintiffs were the heirs representing the mortgagor. The purchaser at the sale was the mortgagee. The sale took place after notice had been wrongly served upon a person who was not the legal representative of the judgment-debtor's estate. The executing Court had erroneously decided that he was to be treated as such representative.

*Held*, that the judicial sale was not a nullity, and could not be treated as invalid, notwithstanding this irregularity, even though a material one, for the jurisdiction of the Court to execute had been complete throughout. It had not been lost by reason of the above error, and had empowered the Court to decide wrongly as well as rightly.

* Present: LORDS HOBHOUSE, MACNAGHTEN, and LINDLEY, SIR RICHARD COUCH, and SIR HENRY DE VILLIERS.

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On an irregularity such as this the aggrieved party had his remedy by taking within due time the course prescribed in section 311 of the Civil Procedure Code (X of 1877), or suing for getting the order set aside. That course had not been followed within the period fixed by art. 12, schedule II, of the Limitation Act XV of 1877, *viz.* one year from the confirmation of the sale, which was valid, and formed a defence to this suit.

*Baswantapa* v. *Ranu* distinguished.(1) There the Court actually had not the jurisdiction which it purported to exercise. Here the Court having jurisdiction had by its decree established the debtor's liability and was in the process of working it out against his estate, when the irregularity took place.

APPEAL from a decree (19th December, 1895,) of the High Court of Bombay reversing on second appeal a decree (22nd August, 1893,) of the Subordinate Judge of Sholápur exercising appellate powers. The latter Court had affirmed the original decree (2nd February, 1891,) of the Subordinate Judge in that district. The case in the High Court is reported *sub-nom. Erava* v. *Sidramappa Pasare* in 21 Bom. 424.

This was a suit for redemption. The plaintiffs were the daughters of one Nagappa, who mortgaged the property in question to the defendant's father Sidramappa Pasare for Rs. 3000 on the 28th March, 1877. Subsequently, *viz.* on the 27th June, 1877, one Hanmant Vithal obtained a money-decree (No. 687 of 1877) against Nagappa, but, before it was executed, Nagappa died, having by his will dated 15th February, 1875, bequeathed all his property to the plaintiffs.

After Nagappa's death, Hanmant Vithal on the 22nd November, 1878, applied for execution of the decree "against defendant Nagappa, deceased, by his heir and nephew Ramalinga." A year having elapsed since the decree, notice was issued under section 248 of the Civil Procedure Code (XIV of 1882). This notice, however, was issued to one Ramalinga, the nephew of Nagappa, and not to the plaintiffs. Ramalinga appeared and informed the Court that he was separated from his deceased uncle Nagappa and that he was not Nagappa's heir; that the plaintiffs were Nagappa's heirs and that he was not in possession of the estate. He was informed by the Court that the application was not against his property, but against the estate of the deceased

(1) (1884) 9 Bom. 86.

Nagappa, and that if his property should be attached, he would have his remedy after attachment.

The attachment issued and was followed by a proclamation of sale in which the defendant was described as "Nagappa, deceased after decree: heir Ramalinga," and the interest to be sold as that of "Nagappa, deceased, his heir Ramalinga." At the execution sale on the 9th June, 1880, the mortgagee Sidramappa purchased the property, and a certificate of sale was granted to him when the sale was confirmed. He had given notice of his mortgage and the sale was made subject to it. The certificate of sale described the interest sold as that of "deceased Nagappa." On the 11th October, 1880, Sidramappa was put into formal possession, he being already in possession as mortgagee.

In the year 1889 the plaintiffs brought the present suit as heirs of their father Nagappa and also as legatees under his will, for an account of the mortgage of the 28th March, 1877, and for redemption. The defendant relied upon the title which he had acquired by his purchase at the judicial sale of the 9th June, 1880. He contended that as such purchaser he was entitled to the property; that the plaintiffs had full knowledge and notice of the sale; that the certificate of sale was duly registered; that in a redemption suit they could not call in question the legality of the sale. He pointed out in his written statement that the plaint said nothing of this sale and he pleaded that the sale, unless set aside, precluded the right to redeem and that "the mortgage debt" merged in the purchase.

The main question between the parties was whether the sale in execution was a nullity, inasmuch as due notice had not been previously given to the legal representative of the mortgagor.

The Subordinate Judge dismissed the suit, holding that the sale was not invalidated by the irregularity. That judgment was affirmed by the Court of first appeal.

The plaintiffs then filed in the High Court their second appeal on the point of law, and a Division Bench (Farran, C.J., and Parsons, J.) were unable to concur in a decision. (See I. L. R. 21 Bom. p. 428 and p. 436.)

Farran, C.J., was of opinion that notice to the true representatives of the deceased judgment-debtor was necessary: and "that

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unless such notice is issued and the representatives of the judgment-debtor are given an opportunity of showing cause against the enforcement of the decree by execution, a warrant to execute it issued and an attachment levied under such warrant, and a sale held in pursuance of it are informal and irregular, and that the legal representative is entitled to have the same set aside as of right if he applies in time and an interest superior to his has not supervened."

The Chief Justice proceeded to say (p. 432) :—"The further question, however, arises whether the several proceedings prior to and including the auction-sale are in such cases absolutely null and void, or whether they are not, though liable to be avoided at the instance of the legal representative of the judgment-debtor, valid until set aside. The latter is, I think, the case. The proceedings and sale, if not challenged within the time which the law allows for that purpose, convey title to the purchaser. The decree is, as I have shown, a living decree; the formal steps have been taken to effect a sale under it; the property attached and sold is property liable to be attached and sold under the decree; the law confers upon the Court the jurisdiction to sell. All is complete save that a person who ought to have had notice of the proceedings has not been notified. I can see no reason for holding that on that account the proceedings are a nullity and that nothing passes under the sale." He added (p. 433) : "How, it may well be asked, can a purchaser know whether a notice under section 248 has been issued or not, or if issued, whether it has been duly served. . . . Again, how, if he enquires and finds that the notice has been served, is he to know that it has been served on the proper person though served upon the apparent heir? A will appointing an executor may subsequently be found. There is no security for him. Consider then the position of the legal representative. As a rule he is not damnified at all. The property of the dead man is made answerable for the debt of the dead man. If the legal representative objects to this he can come in and set the sale aside. This affords him full protection. Is he to be allowed when the estate which has devolved upon him has had the benefit of the sale-proceeds of the property sold, to fold his hands for twelve years and see whether the property

will rise in value, and then, if it does, to evict the purchaser? I cannot bring myself to believe that such is the law."

The Chief Justice was inclined to hold that the purchaser's title became absolute upon confirmation of the sale, but considered it unnecessary to decide that point, as he held that the right to set aside the sale was barred by limitation at the date of his Judgment (18th September, 1895) more than twelve years having elapsed since the sale (in 1880); and the learned Chief Justice observed (p. 435):—"Even now there is no suit to set it aside." He added: "It is found that they '(the plaintiffs)' knew of the sale. It is certain that they were not purposely kept in ignorance of it."

Parsons, J., considered (p. 436) that the point for decision was:—"Does a purchase at a sale in execution of a mere money decree convey any title to the purchaser when the application to execute the decree has been made against a person other than the legal representative of the deceased judgment-debtor, and no notice under section 248 of the Civil Procedure Code has been given to the legal representative?"

He held that such a sale is "a nullity and has no valid or binding effect on the estate of the deceased in the hands of the legal representative"; and he quoted *Baswantapa* v. *Ranu*[1] in support of his conclusion.

On this difference of opinion the case was referred to a Bench of three Judges (Candy, Jardine and Ranade). Their judgments are reported in I. L. R. 21 Bom. 443 *et seq.*

The decree of the High Court therefore reversed the decree of the lower Courts and remanded the suit for an account of what was due on the mortgage.

The defendant appealed to the Privy Council.

*A. Phillips* for the appellant (defendant) argued that the Chief Justice's opinion was correct, and that there was error in the judgments of the three Judges to whom the reference had been made. The case referred to in support of the claim to redeem, *Bhagvant Govind* v. *Kondi*,[2] was a case of an unauthorized sale, and not one where a judicial sale had been

(1) (1884) 9 Bom. 86.

(2) (1889) 14 Bom. 279.

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decided to have been invalid. The sale there had in fact been a sale by the widows of a mortgagor to the mortgagee's agent, and the equity of redemption had been sold during the minority of the mortgagor's son. In this case the sale was a judicial sale by order of a Court, and that Court, on objection taken, had decided that Ramalinga as heir of the deceased Nagappa represented him, and had consequently been correctly treated as the person to whom notice should be given of the intended sale. That decision was arrived at by a Court having complete jurisdiction over the subject-matter and the person against whom it was directed, so that, even if wrong, it must be treated as one of which the error did not affect the appellant, who was in no way bound to inquire into, or establish, the correctness of it. The appellant was entitled to rely upon it. If the decision was wrong, that would not render the sale null and void. At the most its being wrong, and contrary to fact, would have been a ground, within the permitted time, for suing to have the sale set aside. That could not be done in this suit. The suit was not framed for that purpose, and had been persisted in, notwithstanding that the defence had pointed out the obstacle to the plaintiff's claim to redeem existing in the sale. Nor was the decree-holder a party to this claim. Redemption of the mortgage was the object of the plaint, which did not mention the sale, and the appellant was a *bona fide* purchaser for value. The sale proceedings were to all appearance regular, and the appellant had had no notice of irregularity in them. But the main defence on which the defendant relied was that any suit to have set aside the sale was barred at the expiration of one year from the date of the certificate of sale, under Act XV of 1877, schedule II, article 12.

The respondents did not appear. Afterwards, on the 21st July, their Lordships' judgment was delivered by

LORD HOBHOUSE:—The respondents to this appeal represent the plaintiffs below who instituted their suit on the 24th January, 1889. The defendant below is now represented by the appellant.

The plaintiffs stated that on 28th March, 1877, one Nagappa, whose heirs they are, mortgaged the land to the defendant to secure the sum of Rs. 3,000; and they prayed for accounts and redemption of the mortgage.

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The only defence which need now be considered was that in a suit instituted against Nagappa by a creditor of his named Vithal a decree was obtained in execution of which Nagappa's interest in the property was put up for sale; that it was purchased by the defendant on 9th June, 1880; and that on 11th October, 1880, possession was given to the defendant and had continued with him ever since. The plaint was wholly silent about this sale. The written statement went on to suggest that the plaintiffs might possibly contend that the sale was illegal because it took place without the plaintiffs being joined in the certificate as heirs. The defendant said that he waited to hear whether the plaintiffs would make any such case, but that if they did he had an answer to it; and he pleaded by anticipation that the legality of the sale could not be impeached in the present suit, one reason being that Vithal, the decree-holder, was no party to the suit. Finally, the defendant put in a distinct plea that the claim for redemption cannot be maintained unless a suit is brought to set aside the sale.

The plaintiffs persisted in their suit according to its original frame. Eleven issues were settled by the First Court. The first issue was whether the mortgage debt merged in the subsequent purchase. In point of form that issue was not adapted to the facts of the case; nor, as it was treated by the First Court, was it adapted in point of substance. There was no issue adapted to examine the propriety of the execution proceedings.

The First Court dismissed the suit on the ground, as the learned Judge expressed it, that the mortgage merged in the purchase. The plaintiffs appealed. They complained that proper issues had not been stated, and that they had been prevented from tendering evidence on points connected with the regularity of the execution proceedings. The defendant made objections to the same effect. But no further issues were stated, and no further evidence was given.

The Judge of the Second Court, the first Appeal Court, who is styled the Joint First Class Subordinate Judge, A.P., at Sholápur, affirmed the decree below. As there has been no remand of the case on account of defects in the issues or evidence, his findings of fact are in this stage conclusive; and from them and

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the documents referred to in them the case appears to stand as follows. Vithal's decree was against Nagappa as principal debtor and Wyankappa as surety. The latter was Nagappa's son-in-law, being the husband of Tukava, one of the original plaintiffs in this suit. The date of the decree was 27th June, 1877. It is an important document, but there is no copy of it in the record. It is spoken of as a simple decree for payment of money; but from the terms of the application for execution, which was made on 22nd November, 1878, it appears that the decree also related to some property which was mortgaged, and that on a previous application made in the year 1878 a trifling sum, Rs. 3-4-0, had been realised by sale of that property. The application is in a tabular form as required by the then Code of Procedure, the terms of which are those of section 235 of the existing Code of 1882. The name of the person against whom the execution is sought is given as "the estate of the deceased Nagappa." The names of the parties are given as, first Nagappa deceased by his heir Ramlingappa, and secondly Wyankappa. The relief sought is sale of the immoveable property of the deceased defendant for the realisation of Rs. 65 and a fraction, being the balance remaining due under the decree.

Notices were served upon Ramlingappa and Wyankappa. The former was the nephew of Nagappa, but was not his heir, the family having been divided as the Court has now found. On the 23rd December, 1878, Ramlingappa appeared to show cause. What then took place appears from an entry of that date. Ramlingappa stated: "As Nagappa separated from my father even during [my father's] lifetime, I am not Nagappa's heir. His heirs are his daughters" (and he named them, meaning to name the plaintiffs). "I have not with me any 'estate' of the deceased nor did I receive it. Therefore this decree should not be executed against me."

The Court's judgment was as follows: "The plaintiffs' application for execution is not against other property: it is against the 'estate' of the deceased. If [any] property belonging to you is included in that [estate], you should take legal steps after the attachment is levied."

After that the execution proceedings went on with the result that the mortgaged property was put up on the 9th June, 1880,

to be sold subject to the charge then stated to be Rs. 3,680, and was bought by the defendant. It would appear that the property was considered to be worth nothing substantial beyond the mortgage debt; the highest biddings for all the lots only amounting to Rs. 9-12-0.

The second Court dismissed the plaintiffs' appeal. The learned Judge proceeded on the ground that Ramlingappa was a legal representative of Nagappa within the meaning of the Code, because he was a relative of the deceased and was possessed of some of his property. He also relied on the presence of Wyankappa as a party to the execution proceedings, arguing that knowledge of them was thus brought home to the plaintiffs, and that they could not be allowed to lie by for years and then, after the property had increased in value, to treat the sale as invalid. If, he said, they objected to the proceedings as irregular, they ought to have sued within the year allowed by the law of limitation.

The plaintiffs appealed to the High Court, when there appeared a great variety of judicial opinion. The appeal was first heard before Sir Charles Farran, C.J., and Parsons, J. The former of those learned Judges pointed out the insufficiency of the reasons assigned by the Courts below for their decrees. He held that notice should have been served on Nagappa's heirs, and that in default of such notice the sale was informal and irregular, and might be set aside on an application made in good time. Then he addressed himself to the question whether the sale, however irregular, was a nullity; and he held that it was not, that it must be set aside before the plaintiffs could recover the property, and that they had never sued to set it aside. Parsons, J., on the other hand held that the sale was an entire nullity and that the plaintiffs were entitled to proceed as if it had never taken place.

Upon this conflict of opinion the case was referred to three other Judges of the High Court. Ranade, J., agreed with Parsons, J., that the Court had no jurisdiction at all to make the sale which was consequently a nullity. Candy, J., without deciding the point, assumed for the purpose of his judgment that the sale passed the property subject to challenge in a regular suit, but he held the present suit to be a suit for that purpose. He further held

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that the suit was brought in good time; apparently on the ground that the right to set aside the sale is subservient to the right to redeem, and that the necessity of impugning the sale arises from the defendant resisting the suit to redeem. Jardine, J., gives his reasons at length for holding that the Court had jurisdiction to order the sale and that the sale was not a nullity. But then he expresses agreement with Candy, J., as to the nature of the present suit and its competency. The decree of the High Court does nothing but direct accounts to determine what amount the plaintiffs must pay for redemption. It does not set aside the sale. It must therefore rest on the principle that the sale is an absolute nullity, though in fact only one of the Judges on the first hearing and one on the second hearing was of that opinion.

This is indeed the cardinal point of the case, and it is one of great importance to all those who take property under the apparent security afforded by a judicial sale; which in India is conducted not by the creditor who seeks payment, but by the Court itself. It is very unfortunate that the views which have prevailed in the High Court have not been supported by any argument at this bar. Their Lordships have done what they can to understand and appreciate the views of the two learned Judges, who think that the sale was a nullity, and to examine the authorities cited for that opinion, but they feel the disadvantage of being without a respondent.

It is not disputed that if the Court took proceedings wholly without jurisdiction the plaintiffs would remain unaffected by them, and two of the learned Judges below go the whole length of affirming that the execution Court had no jurisdiction. But a decree had been made, and partially, though to a minute extent, executed against Nagappa; and his estate was liable to make good the balance. To enforce this liability was within the jurisdiction of the Court. If a judgment-debtor dies before full execution of a decree the creditor may apply for execution against his legal representative. To receive that application is part of the Court's jurisdiction. In point of fact the application made was against "the estate of Nagappa," and in another column Ramlingappa is named as his heir. The Court had jurisdiction to receive such

an application and either to reject it as defective or to order some further proceeding. If Ramlingappa had actually been successor in title nobody could have objected to the regularity of the proceedings. If there had been a dispute who was heir or whether the property had or had not devolved upon the heir, it was for the Court to determine such matters for the purpose of the execution. If it had been found impossible to discover whether any representative of the deceased was in existence, it was for the Court to say what steps should be taken. All these matters, which might involve questions of nicety, were for the Court to decide. It is clear that the jurisdiction was not lost for the reason that the form of application might be open to exception. How was it lost afterwards?

The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied for. It did issue notice to Ramlingappa. He contended that he was not the right person, but the Court having received his protest decided that he was the right person, and so proceeded with the execution. In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law. Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the fact and that if he is to be held bound to inquire into the accuracy of the Court's conduct of its own business no purchaser at a court-sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do.

As for authority, many cases are cited, but their Lordships cannot find any decision which supports the one now under discus-

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sion. That which is relied on by Candy, J., is *Baswantapa* v. *Ranu*.[1] In that case the creditor of a man who was dead sued his mother in the character of heir, whereas the real heir of the debtor was his widow. In August, 1878, the creditor obtained a decree *ex parte* upon which execution took place, and the debtor's property was transferred to the defendant in November, 1880. In 1881 a son, adopted by the widow of the debtor, sued by her as his guardian to recover the land. The plea of bar by time under article 12 of the Limitation Act was set up; and it was held that the article did not apply, because the sale was a nullity and there was no need to set it aside. In that case neither the debtor nor his estate were ever made subject to the decree of the Court, the liability never was established, and the process of execution had nothing to rest upon. The Court actually had not the jurisdiction which it purported to exercise. It is a different matter when the Court has by its decree established the debtor's liability and is in the process of working it out against his estate.

Other decisions are cited in which proper notices have not been served after decree; but on examining them they all appear to be cases in which proceedings have been taken, either under section 311 of the Code or by independent suit, within the year allowed for setting aside a sale. In such cases the necessity for distinguishing between irregularity and nullity does not arise; and general assertions of the invalidity of such sales, quite appropriate to the case in which and the purpose for which they are used, are only misleading when separated from their context and applied to a case in which the distinction between irregularity and nullity is the cardinal point.

It is then necessary for the plaintiffs to set aside the sale in order to clear the ground for redemption of the mortgage. There can be no question that omission to serve notice on the legal representative is a serious irregularity, sufficient by itself to entitle the plaintiff to vacate the sale. But there may be defences to such a proceeding, and justice cannot be done unless those defences are examined by legal methods. It may be that the plaintiffs could unite a suit to set aside with one to redeem,

(1) (1884) 9 Bom. 86.

and that the defendant's anticipatory plea of misjoinder would if tried have been overruled. But that need not be discussed, because their Lordships think it to be beyond reasonable dispute that this is not a suit to set aside the sale.

The plaintiffs have deliberately refused to make it such a suit in the face of the defendant's challenge. It can only be called a suit to set aside a sale in the sense in which any other suit might be so called if it prayed relief inconsistent with the validity of the sale. Candy, J., considers that the only thing wanting is a formal prayer to set the sale aside, and he says that if the plea had been raised that there was no such prayer, leave would have been given to amend. In fact the plea was raised at a time when the plaintiffs could amend at their option, but they did not do it. To give leave to amend at the hearing may have been in the discretion of the Court, but it would be very far from a matter of course to do so. It would be giving leave to institute a new suit with the date of an earlier one. The decree-holder would be affected by it. He would be a proper party and (unless there is some recognised practice in India to the contrary as to which Mr. Phillips could not inform the Board) a necessary one. The issues would be different. It cannot be denied that the conduct of interested parties at the time of sale may be a bar to them when they come to set it aside. The defendant said openly that if the plaintiffs made a case for setting aside the sale he had got an answer to it. If the plaintiffs then made such a case he must have been allowed to make his answer, and the issues raised by him or by the judgment-creditor must have been tried. When defeated in the first Court the plaintiffs complained that proper issues had not been framed for trying points connected with the sale; which was true, though it was their own fault; but they did not ask to remodel their suit. When defeated in the second Court they complained that the Court had drawn presumptions as to their knowledge of the sale without issues or evidence, which was true; but they did not ask to remodel their suit. In fact their case has been conducted throughout on the principle that the question of nullity was the sole question, and that they could not succeed on any other ground. To allow them now to shift their ground and to make a new case, and that too without allowing the

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defendant an opportunity of making the defence which, he says, he has in reserve, is wrong in principle and is calculated to work practical injustice.

In the case of *Jagadamba Chowdrani* v. *Dakhina Mohun*, reported in L. R. 13 Ind. App. p. 84,[1] the plaintiffs were reversionary heirs of a deceased Hindu, subject to the interest of his widows. They brought suits not long after the surviving widow's death to recover the estate. But adoptions had been made in 1853 and 1856, either of which, if valid, would displace the plaintiffs. The law of limitation applicable to the case (the Act of 1871) provided that a suit to set aside an adoption must be brought within twelve years after the date of the adoption. The plaintiffs sued, not to set aside the adoptions, but to recover the estate; and they argued that their title was good until an adoption was set up; that those who set it up must prove its validity; which accordingly might be controverted by the plaintiffs. There was difficulty in the case because the expression "set aside an adoption" is inaccurate; an adoption cannot be set aside, though its validity may be impeached; and in fact the language was altered in 1877 before the appeal was heard. This Board found, however, that the expression had been frequently used in legal documents and was known to Indian lawyers as a short way of denoting any process in which the fact or the validity of an adoption was disputed. On that ground they held that the Legislature must have intended to place the specified limit on suits for these purposes. Then the suit, being rightly described as one to set aside an adoption, attracted the consequence that the time for suing ran from the date of the adoption, and that the suits of 1873 and 1874 were barred. It is obvious that the expression "set aside a sale" is not attended by any such difficulty, because a sale, valid until set aside, can be legally and literally set aside; and anybody who desires relief inconsistent with it may and should pray to set it aside. That brings us to the last point in this rather tangled controversy, *viz.* what is the period allowed for setting a sale aside?

Their Lordships have discussed the nature of the suit in detail because the two learned Judges who affirm or assume the reality

[1] (1886) 13 Cal. 308.

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of the sale make the case turn upon it. But if the conclusion could be reached that the suit is one to set aside the sale, the result would be equally fatal to the plaintiffs. Article 12 (*a*) of the Limitation Act of 1877 provides that a suit to set aside a sale in execution of a decree must be brought within one year after the sale is confirmed. That seems precisely applicable to the present case. It is said by Candy, J. (with whom Jardine, J. agrees) that it had not been contended that the plaintiffs were bound to sue within the year : and he refers to a text-book for cases to show that the article does not apply to a suit for a declaration that the sale is inoperative as against the plaintiff. Here the sale is, as their Lordships hold, and as the learned Judge himself assumes, operative as against the plaintiffs though liable to be set aside for due cause.

The only case cited by the learned Judge himself is *Bhagvant Govind* v. *Kondi*, reported in 14 Bom. 279. In that case there was no judicial sale. Property was mortgaged by a Hindu, and after his death his widows, who seem also to have been guardians of his infant heir, sold the property to a trustee for the mortgagee. The heir sued to redeem, but not till after the expiry of the three years after his majority, which by article 44 of the Limitation Act are the limit of time for setting aside a sale by a guardian. In overruling the plea of limitation the Court made the following observations : "The necessity of impugning the sale of 1863 to the second defendant arises from the second defendant's resisting the plaintiff's suit to redeem the mortgage and is therefore subservient to that suit." That is the only reason assigned for overruling the plea.

Candy, J., says that these observations apply exactly to the facts of the present case. Possibly they do, but their Lordships find it impossible to grasp the reasoning behind them. If it means that the right to set aside the sale is kept alive as long as the right to redeem would subsist by virtue of the mortgage, the result is that the validity of the sale might be held in suspense for sixty years. The two learned Judges intimate that there is a limit of twelve years, but how that limit is arrived at does not appear. They treat the sale as valid until vacated, but apparently they allow it just so much validity as suffices to turn the possession of

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the mortgagee into the adverse possession of an absolute owner, and no more. But if the sale is a reality at all, it is a reality defeasible only in the way pointed out by law; and it seems to their Lordships that the case must fall either within section 311 of the Code or within article 12 (*a*) of the Limitation Act of 1877, or within both; anyway, there exists a bar by one year's delay.

The Limitation Act protects *bonâ fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small. Such however seems to be the effect of the doctrine of subservience laid down by the Bombay High Court. In the adoption case just cited from 13 Ind. App. this Board remarked that there was no principle on which simple declarations of invalidity should be barred by the lapse of twelve years after the adoption, while the very same issue, if only mixed up with a suit for the possession of the same property, is left open for twelve years after the death of the widow. Their Lordships make the same remark now. What is the justification for refusing to construe article 12 (*a*) according to its obvious meaning whenever a suitor goes on to pray for that relief which is the object, perhaps the only object, of setting aside the sale? Their Lordships hold that both the letter and the spirit of the Limitation Act require that this suit, when looked on as a suit to set aside the sale, should fall within the prohibition of the article.

The High Court ought to have dismissed the plaintiff's appeal with costs, in accordance with the opinion of the learned Chief Justice. Their Lordships will now humbly advise Her Majesty to make that order, reversing the decree appealed from. The respondents must pay the costs of this appeal.

*Appeal allowed.*

Solicitors for the appellant:—*Messrs. Edwards, Heron & Co*

# ORIGINAL CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Tyabji and Mr. Justice Russell.*

*RE* MANILAL HURGOVAN, A MINOR. HURGOVAN MANCHAND, APPLICANT.

1900. *December* 21.

*Minor — Guardian appointed of property of a minor who was a member of a joint Hindu family and the property was joint property—Sanction given for sale of family property in which minor had a share — Jurisdiction of High Court.*

Under its general jurisdiction and apart from the Guardian and Wards' Act (VIII of 1890), the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property.

The applicant in this case who sought to be appointed guardian also sought the sanction of the Court for a sale of the family property in which the minor was interested,

*Held*, under the special circumstances of the case, that the sanction should be given.

APPLICATION to be appointed guardian of the property of a minor who was a member of a joint family, and for leave to sell the minor's interest in certain immoveable property.

The applicant Hurgovan Manchand in his affidavit stated that he was the father of the minor, a child eight years old, who was living with him and was his only son. A certain house situate at Mumbádevi in Bombay had been purchased by the applicant's father in 1862 for Rs. 15,000, and, on partition of the family property in 1873, had fallen to the applicant's share. He had recently been involved in litigation with his brothers in which he had been successful, but they had not been able to pay his costs and he was therefore obliged to borrow money to pay his attorneys. In order to raise money to pay off this debt, he had agreed to sell the above-mentioned house for Rs. 40,000. The house was in need of repairs, but he had no means to defray the cost necessary for effecting the repairs, and, if the repairs were not made, the property would suffer and its value be greatly diminished. The present offer he regarded as a very favourable one, but the proposed purchaser having regard to the fact that

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the applicant's minor son was interested in the said house, which was joint family property, insisted that the applicant should obtain an order of Court authorizing him to execute the conveyance in respect of the right and interest of the said minor in the house. The following paragraphs of his affidavit are material:—

"12. I submit that the agreement for sale of the house which I have made for Rs. 40,000 is a very profitable bargain, and there is no probability of my realising anything like the said price if the present agreement goes off, and it is to the interest of me, this deponent, and my said son that the said contract for sale should be carried out.

"13. I say I am willing that a moiety of the said sum of Rs. 40,000, after deducting all costs of and incidental to the sale, should be invested in Government paper and held by the Accountant of this Honourable Court for the benefit of the said minor.

"14. Under the above circumstances I pray that this Honourable Court will be pleased to make an order appointing me guardian of the property of the said minor and authorising me to convey the right, title and interest of my said son in the said property as such guardian as aforesaid on such terms and conditions as this Honourable Court may think proper to safeguard the interests of my said minor son."

*Inverarity* for petitioner.

The applicant asks to be appointed guardian of his minor son and that the Court will sanction the sale of the house in which the minor has a share. The question is whether the Court has jurisdiction to appoint a guardian of property of a minor, when that minor is a member of an undivided Hindu family and his property consists of an undivided share of the family property. In two cases under Act VIII of 1890, *Sham Kuar* v. *Mohanund*[1] and *Virupakshappa* v. *Nilgangava*[2] it has been held that in such cases a guardian of the property cannot be appointed. I submit that these decisions do not apply to such a case as the present. Here it is the manager of the family who applies to be guardian. These decisions are based on the fact that a guardian cannot get possession of the minor's undivided share and that to give authority over such property to a person who is a stranger to the family would create dissension between him and the legal manager of the family. That reason however does not

(1) (1891) 19 Cal. 301. (2) (1894) 19 Bom. 309.

apply here where it is the manager himself who applies to be made guardian.

[JENKINS, C.J.:—Why does he want to be guardian? As manager of the family he has a right to deal with the family property.]

Yes, but the person who desires to purchase rightly thinks he would get a better title if a guardian of the minor's share were appointed and the Court's sanction given to the sale. The minor could not hereafter question the sale as he might do if it were made by the manager in that capacity alone.

[JENKINS, C.J.:—That is the difficulty in the way of granting the application. We would take away the minor's right hereafter to question the sale if he thinks proper to do so.]

That is a right that need not be considered in this case. We are willing to protect his rights in every way. As the family is constituted at present he has a right to a half-share of this property; the other half is ours. We are willing if allowed to sell to pay over half the amount to the Accountant General in the minor's name and for the minor's benefit. We can now get Rs. 40,000 for the property. The minor will get Rs. 20,000.

I say then that, even under the Guardian and Wards Act (VIII of 1890), the Court has power to grant this application, and that the cases I have referred to are not authorities against me, inasmuch as they are not cases in which the manager of a family sought to be guardian.

But this is not an application under that Act, and I say that independently of that Act this Court has power to make the order we ask. *Re Jairam Luxmon*[1]; *Re Jagannath*.[2] I have here a list of nineteen cases (not, I believe, exhaustive), extending over a period of fifteen years, in which this Court has made similar orders. If the Court now holds that it has no jurisdiction to make such an order it will destroy the title to all the properties which have been dealt with on the strength of these orders.

Assuming then that this Court can appoint a guardian, the next question is, will it sanction a sale of the minor's property.

(1) (1892) 16 Bom. 634. (2) (1893) 19 Bom. 96.

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In England, no doubt, the Court would not sanction a sale of realty. (See Simpson on Infants, 2nd edition, chap. XX.) The sale converts realty into personalty. That is one reason which influences the Court there. But in India there is no distinction between realty and personalty. Here it really amounts merely to changing the investment of the minor's property, and the Court's power to do that is recognised in section 29 of Act VIII of 1890.

In this case if the Court can do so it ought to order a sale. The house is in bad repair. We have no money to repair it. It will be pulled down by the Municipality if not repaired and everybody will be the loser. We can get Rs. 40,000 now for it. My client is interested to the extent of one-half, so that is some guarantee that the price is the best obtainable. It was bought in 1862 for Rs. 15,000.

[Jenkins, C.J.:—Why does the manager want to sell it?]

He owes a debt of Rs. 1,500 and wants to pay off that debt, and besides he has no money to keep up the house. The debt no doubt is so small that by itself it would not justify a sale. But it is to be remembered that as manager the applicant can sell this house without coming to Court at all. The only result will be that, so selling it, he will get a much smaller price and every one will be the loser. Also, if he sells in that way he will get all the purchase-money into his hands, and he may (I do not say he will) squander it all away. The minor will have no redress. He cannot follow the money. It is therefore clearly to the minor's advantage that we should be allowed to sell for Rs. 40,000 and that Rs. 20,000 should be secured to him. On these grounds the Court should sanction the sale.

Jenkins, C.J.:—(Tyabji and Russell, JJ., concurring). The question here is whether under our general jurisdiction and apart from the Guardian and Wards Act (VIII of 1890), this Court can appoint a guardian of the property of an infant who is a member of a joint Hindu family and when that property is an undivided share in the family property. Having regard to the long line of decisions of this Court, to which our attention has been called, I think we ought not now to repudiate this jurisdiction,

and thus imperil the title to property which has been dealt with in reliance upon these decisions. We hold therefore that this Court has power in such cases as this to appoint a guardian of the property of a minor.

But in coming to this conclusion we desire to add that it is a power to be exercised with the greatest caution. We make appointment in this case because the person applying to be appointed the guardian is also the manager of the family to which the minor belongs, and thus we do not introduce into the family any element of possible disturbance. I can hardly imagine a case in which it would be right to grant such an appointment unless the applicant were the manager, and it is expressly upon this ground that we make the appointment in this case.

The next point is whether we ought to sanction the proposed sale of property. It is immoveable property. The Court of Chancery in England will not sanction the sale of real property in these cases, but they are influenced by considerations which have no place here. In England the Court's refusal is based upon the doctrine of conversion which affects the power of the minor to dispose of the property by will and also alters the line of succession. It is for these reasons that the Court refuses to sanction a sale of real property, and it is plain that these reasons do not apply in India where no difference is made between what in England is known as real and personal estate. Immoveable property is no doubt more durable than moveable property, and if that were the only point to be considered we would hesitate about altering the nature of property in which an infant has an interest. But in Bombay one member of an undivided family can dispose of his share in the family property. The result is that, if we withhold our sanction to this sale, it will be open to the applicant, who is the father and legal manager of the family, to dispose if not of the whole, at all events of a moiety of the family property. It seems therefore that the best we can do for the minor is to see that at any rate a moiety is secured for him. To that the father assents and, in view of the fact that, with our sanction, a considerably larger price will be obtained for the property than could be obtained by a sale without it, I think we ought to sanction the sale. It appears

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that it was bought between thirty and forty years ago for Rs 15,000. The applicant says he can now get Rs. 40,000 for it, and he has an obvious interest in getting the highest possible price for it. I do not think it necessary to refer the question of value to an expert.

We therefore hold that we have jurisdiction to appoint the applicant guardian of the minor and we sanction the sale of this property.

Attorneys for the petitioner:—*Messrs. Bhaishankar and Kanga.*

## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

1900. *November* 26.

MAHADEO (ORIGINAL DEFENDANT 3), APPELLANT, *v.* PARASHRAM BHAWANCHAND AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Limitation—Limitation Act (XV of 1877), schedule II, article 144—Symbolical possession—Effect of symbolical possession as between judgment-creditor or his assigns and judgment-debtor or his heirs—Suit by purchaser from judgment-creditor to recover possession from heir of judgment-debtor.*

As between the judgment-creditor or his assigns on one side, and the judgment-debtor or his heirs on the other, symbolical possession is as good as actual possession to give the (judgment-creditor's) purchaser or his assigns the right to bring a suit for possession within twelve years from the date of such symbolical possession.

SECOND appeal from R. Knight, District Judge of Sátára.

Suit to recover possession of land. The land originally belonged to the defendant's father, against whom in 1882 a decree was obtained by one Bhawanchand under which Bhawanchand became entitled to it. Bhawanchand died and left a son Parashram (the plaintiff), who was then a minor and was represented by his guardian, Gangabai. In 1886 Gangabai sold the decree against defendant's father to Dalasukha and Ambaram and afterwards applied for execution of the decree and obtained

* Second Appeal No. 420 of 1900.

an order directing the Názir to put her "or Ambaram on her behalf" in possession of the land.

The defendant's uncle obstructed the execution of this order and proceedings were taken under section 331 of the Civil Procedure Code (XIV of 1882) and an order was made in 1886 directing that Gangabai should be put in possession. This order was executed, and Gangabai was put into formal possession on the 14th December, 1886.

The decree was subsequently again assigned and the plaintiffs were the heirs of the assignees. They now sued to recover possession from the defendants, basing their title on the decree. They valued their claim at Rs. 254, which included not merely the claim for the land, but also a sum of Rs. 165 for mesne profits.

The defendants denied that they had ever ceased to have possession and they contended that Gangabai had no right to possession under the order of December, 1886, inasmuch as she had assigned the decree; that the proceedings in 1886 were void, and that this suit, being brought more than twelve years after the date of the decree in 1882, is barred.

The Subordinate Judge dismissed the suit.

The plaintiffs appealed on the point of their right to recover possession and they valued this claim at Rs. 89. The Appellate Court reversed the lower Court's decree and allowed the whole claim of the plaintiffs (valued in the lower Court as above stated at Rs. 254). The Judge held that the present suit was not barred by limitation, being within twelve years from the date of the symbolical possession obtained by Gangabai in 1886. In his judgment he said:—

"I cannot endorse the view taken in the lower Court. Although Gangabai had sold her rights under the decree before she obtained execution of it, it is still clear from section 232, Civil Procedure Code, that the right to obtain execution continued to vest in her alone. The transferee could not execute the decree until he had obtained the express permission of the Court to do so, and the Court was at liberty to grant or withhold such permission at its discretion. What the purchaser acquired under the sale-deed, therefore, was an equitable right to compel his vendor to execute the decree on his behalf. It was a sale of an imperfect title and the vendor was bound to complete the title if it lay in her power to do so. Or if this view should not commend itself, it is at least clear,

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both from the fact that Gangabai had sold the decree and from the mention of Ambaram's name in the first order to give possession, that she was acting on behalf of the transferee. This I think is beyond question. The matter now settles itself. The evidence certainly suggests that actual possession never left the defendants, though plaintiffs do not admit this. They are scarcely concerned to deny it however, for even on the supposition that Gangabai obtained nothing but formal or symbolical possession, their claim would be good. Limitation must run from the date on which such possession was taken and the present suit was instituted within twelve years from that date."

Defendant 3 preferred a second appeal.

*Vasudeo R. Joglekar* for the appellant (defendant 3) :—This suit is barred by limitation. The decree in virtue of which the plaintiffs claim the land was passed in 1882.

We never gave up actual possession in the execution proceedings of 1886. What Gangabai then got was mere symbolical possession and such possession is of no use to the plaintiffs—*Harjivan* v. *Shivram*.[1] There is no evidence in the case to show that Gangabai after she got symbolical possession, did any act to put the plaintiffs or their assignors in possession of what she obtained in execution of the decree which she had transferred. This being so, and the plaintiffs having had no connexion with the property in dispute within twelve years of this suit, their claim is time-barred.

Next, we contend that the Judge was wrong in reversing the decree and in allowing the claim in its entirety. In the first Court the whole claim was valued at Rs. 254-3-6, that is the relief for possession was valued at Rs. 89-3-6 and that for mesne profits at Rs. 165. The plaintiffs' claim in appeal related only to possession and not to mesne profits. Therefore the decree of the first Court ought to have been reversed only with respect to possession.

*H. C. Coyaji* for the respondents (plaintiffs) :—Symbolical possession is equivalent to actual possession as between the judgment-creditor and the judgment-debtor. The order of December, 1886, clearly directs that possession should be given to Gangabai, the decree-holder, or to her assignee on her behalf. The assignee was not a mere stranger, therefore the ruling in

(1) (1894) 19 Bom. 620.

*Harjivan* v. *Shivram* [1] does not apply. The decision in *Shankar Bisto* v. *Narsingrao* [2] is in point. Our suit was brought within twelve years from the time Gangabai was put in possession, therefore this suit is not barred.

The Judge in appeal reversed the decree wholly by mere oversight. Even in second appeal the claim is valued at Rs. 254-3-6. This valuation will have to be corrected.

RANADE, J.:—There can be no doubt that as between the judgment-creditor or his assigns on one side, and the judgment-debtor or his heirs on the other, symbolical possession was as good as actual possession to give the purchaser or his assigns the right to bring his suit for possession within twelve years from that date. We only recently discussed this question in a recent judgment of this Court.[3] The case of *Harjivan* v. *Shivram* [4] is not in point, for there the defendant was not the judgment-debtor, but a third person. The decision in *Shankar Bisto* v. *Narsingrao* [5] is an authority in point. The claim was therefore very properly held to be not barred.

As regards the second objection, the claim in the first Court was valued at Rs. 254, including the claim for the property, and Rs. 165 for mesne profits. In appeal the plaintiff valued his claim at Rs. 89 only. The lower Appellate Court however, through oversight, awarded the entire claim. The abandonment of the claim for mesne profits cannot be treated as a mistake, and the valuation corrected now in second appeal as respondent's pleader now suggests.

We vary the decree of the lower Appellate Court by disallowing the claim for mesne profits and restricting it to the property in dispute. Costs in proportion. The remaining costs to be borne by each party.

*Decree varied.*

(1) (1894) 19 Bom. 620.
(2) (1897) 22 Bom. 667.
(3) See *supra* p. 275.
(4) (1894) 19 Bom. 620.
(5) (1897) 22 Bom. 667.

## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

1900. *November* 27.

JAGJIVANDAS (ORIGINAL PLAINTIFF), APPELLANT, *v.* BAI AMBA AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Adverse possession—Joint family—Adverse possession of a co-sharer as against another co-sharer—Burden of proof—Limitation.*

The land in question in this suit had formerly been the joint property of three brothers, Kalian, Dullabh and Vallabh. In 1884 Kalian and Vallabh removed to a village elsewhere, and Dullabh was left in exclusive possession of the land which he cultivated until his death in 1894, when his daughter, the first defendant, entered into possession. In 1888, however, Kalian and Vallabh had sold the land to one Nagar, who in 1895 sold it to the plaintiff. In 1897 the plaintiff brought this suit for possession. The first Court passed a decree in his favour, but on appeal the Judge reversed the decree, holding that the defendant and her father Dullabh had had adverse possession for more than twelve years and that the suit was therefore barred.

On second appeal,

*Held*, by the High Court, that adverse possession had not been proved. The burden of proving adverse possession should have been placed on the defendant. Possession to be adverse must be shown to be continuous, public and adequate to the circumstances of the case.

As between brothers, especially when no partition is proved, the adverse possession of one should be proved by more satisfactory evidence than was given in this case.

SECOND appeal from the decision of Khán Bahádur B. E. Modi, Additional First Class Subordinate Judge, A.P., of Surat, reversing the decree of Ráo Sáheb M. B. Hora, Second Class Subordinate Judge at Surat.

Suit for possession. The land in question had been the joint property of three brothers, Kalian, Dullabh and Vallabh. In the year 1884, Kalian and Vallabh removed to a village in the Gáekwár's territory, and from that time Dullabh remained in exclusive possession of the fields until his death, which took place in 1894, when his daughter Bai Amba (defendant No. 1) took possession.

In November, 1888, Kalian sold the land to one Nagar by a registered deed of sale. This deed of sale was attested by his

* Second Appeal, No. 424 of 1900.

brother Vallabh, and in 1895 Nagar, in his turn, sold the land to Jagjivan Parbhudas (the plaintiff). This sale-deed was attested both by Kalian and Vallabh.

In 1897 plaintiff brought this suit to obtain possession.

He alleged that Kalian had become the sole owner of the land on his undertaking to pay the family debts and that Bai Amba's father Dullabh had cultivated it merely as a tenant.

The defendant contended that she and her father Dullabh had held adverse possession for more than twelve years and that the suit was barred.

The Court of first instance decreed plaintiff's claim, holding that on Kalian's undertaking to pay off the ancestral debts, his brothers Vallabh and Dullabh had relinquished their interest in the land, that Dullabh had been merely a tenant of Kalian and that his possession was not adverse.

This decision was reversed in appeal by the Additional First Class Subordinate Judge, A.P., who held that the property had remained joint, that Dullabh was not a tenant and that his possession being adverse to both Kalian and Vallabh, the suit was barred by limitation.

Plaintiff preferred a second appeal to the High Court.

*Manubhai Nanabhai* for appellant (plaintiff).

*G. H. Desai* for respondent 1 (defendant 1).

RANADE, J.:—The dispute in this case relates to two fields in Uchhrel.

The plaintiff's case was that these two fields together with three others, about which there is no dispute now, belonged to three brothers, Kalian, Dullabh and Vallabh. In a partition between the three brothers, Kalian obtained these lands for his share as he undertook to pay the family debts. Kalian sold the lands to one Nagar in 1945 (Samvat) and Nagar sold them to the plaintiff in Samvat 1951 (1895). The lands were cultivated by Dullabh as tenant of Kalian and Nagar till 1894, when Dullabh died, and his daughter, the defendant Bai Amba, came into possession. When plaintiff claimed possession as purchaser of the lands in dispute, Bai Amba refused to give up possession, and hence the suit.

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Bai Amba stated that in the partition Dullabh her father, and not Kalian, undertook to pay the family debts and the lands fell to Dullabh's share. He was in possession as owner for twenty years, and after his death she, as his daughter and heir, succeeded, and Dullabh had also made a will in her favour. She denied all knowledge of the sales and leases, and stated that Kalian had relinquished all interest in the lands and could give no title to the plaintiff.

The Court of first instance found that the sale-deeds passed by Kalian and Nagar were proved and that they were not nominal transactions. It also found that Dullabh held the lands as tenant of Kalian and Nagar and not in adverse right as owner, so that plaintiff's claim was not time-barred. A decree was accordingly passed in plaintiff's favour.

In appeal the issues were the same as in the first Court. The lower Appellate Court found that there was no partition between the three brothers and the lands did not belong to Kalian solely. It also found that the leases said to have been passed by Dullabh to Kalian and Nagar were forged and did not represent any real transactions. It held, further, that as the property was joint, Kalian had only a one-third share, and that plaintiff, as purchaser from Kalian, could not claim the two fields in dispute because he had obtained possession of the other three fields which exceeded Kalian's one-third share. It accordingly held that plaintiff's suit must fail on this ground, and it held further that it must also fail because Dullabh's possession was in adverse right and for more than twelve years. For this reason also the suit must fail. The decree of the first Court was accordingly reversed and plaintiff's claim disallowed.

In second appeal the chief point urged was that the lower Appellate Court was in error in holding that Dullabh's possession was adverse for over twelve years which barred plaintiff's claim. It was further urged that as the Court had held that there was no partition, Kalian and his other brother Vallabh were owners of the lands in dispute by right of survivorship, and plaintiff succeeded to their rights.

After hearing the arguments on both sides, we feel satisfied that both the grounds on which the lower Appellate Court has

disallowed plaintiff's claim cannot be supported. Accepting the findings of facts of the lower Appellate Court, it is clear that if there were no partition between the brothers, the fields were joint property, and Dullabh cannot claim any exclusive right to the same except on the ground of adverse possession for over twelve years. On Dullabh's death Kalian and Vallabh, his two brothers, would succeed by right of survivorship. As Kalian passed the deed of sale to plaintiff's vendor Nagar, and Vallabh joined in the same, it is plain that all the rights of Kalian and Vallabh would pass to the plaintiff, and the lower Court's view that Kalian only obtained a third share (which was less than the three fields of which plaintiff had obtained possession) and that therefore plaintiff had no right to sue for the two fields cannot be regarded as consistent with the facts found, except of course on the ground of adverse possession.

The question thus really turns upon the point whether Dullabh's possession can be regarded as adverse for over twelve years. If the property was joint, the burden of proving exclusive adverse possession must rest on the defendant, who claims to be Dullabh's heir and devisee. The lower Appellate Court placed this burden on the plaintiff. In the case of a joint family, where no partition was proved, the mere fact that two of the brothers, Kalian and Vallabh, went to live in a neighbouring Gaikwadi village would not make the possession of Dullabh, who continued to live in the village of Uchhrel, necessarily adverse. The respondent's pleader contended that Kalian's deed of sale, as also Nagar's sale-deed, mention the fact of Dullabh's possession. The deeds (Exhibits 29 and 31) show that Dullabh's possession commenced eight years before the deed of sale of 1888, and it was urged that he was thus proved to be in adverse possession for over twelve years at the time of the suit. These recitals in Exhibits 29 and 31 might prove possession over twelve years, but by themselves they cannot prove adverse possession as against Kalian or Nagar, because both the sale-deeds mention the fact that Dullabh held the lands in his possession as tenant. Though the leases were held to be forgeries, these recitals cannot prove that Dullabh's possession was adverse. The only other evidence of adverse possession was that furnished

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by the statement that Dullabh instigated Kalian's creditor Morar to execute his decree against Kalian. Accepting this evidence for what it is worth, this instigation took place in 1889 (Exhibit 40). This evidence would not secure to Dullabh adverse possession for over twelve years, as the present suit was brought in 1897.

These are the only grounds on which the lower Appellate Court has relied to prove Dullabh's adverse possession for over twelve years. They prove nothing of the kind. At the most they prove adverse possession for eight years counting from 1889. Even counting from the time when Kalian left the village towards the end of S. 1941, it is doubtful if Dullabh's possession extended over twelve years. Possession to be adverse must be shown to be continuous, public, and adequate to the circumstances of the case. As between brothers, especially when no partition is proved, the adverse possession of one must be proved by more satisfactory evidence than it has been done in this case—*Radha Proshad Singh* v. *Ram Coomar Singh* [1]; *Lachmeswar Singh* v. *Manowar Hossein*.[2]

We should under these circumstances have felt ourselves justified in reversing the finding of the lower Appellate Court on this point. It appeared to us, however, that in the lower Appellate Court some confusion arose from the way in which the fourth issue was worded. The wording was proper enough in the view taken by the first Court which held the partition proved and the leases genuine. When these findings were reversed by the lower Appellate Court, the old fourth issue was out of place. The burden of proving adverse possession should have been placed on the defendant, and not on the plaintiff. The respondent-defendant may have been prejudiced by this circumstance. We accordingly send down the following issue, *viz.*:—

"Whether the respondent-defendant has proved that Dullabh was in exclusive adverse possession of the lands for over twelve years so as to confer full title on Dullabh?"

Finding to be returned within two months.

*Issue sent down.*

(1) (1877) 1 Cal. L. R. 259 at p. 264. (2) (1891) 19 Cal. 253.

# APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

VINAYAK NARSINVH (ORIGINAL DEFENDANT NO. 1), APPELLANT, *v.* DATTO GOVIND AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.* 1900. *November* 30.

*Hindu Law—Joint family—Self-acquisition—Partition—Burden of proof—Findings of fact—Findings based upon presumptions only—Second appeal—Practice.*

In a suit for partition brought in 1898 the plaintiffs claimed a share in the income of a certain inám village which had been purchased by the defendant in 1873. The defendant pleaded (*a*) that it was his self-acquired property; and (*b*) limitation. The Court of first instance rejected the claim, but in appeal the Judge held that the burden of proving self-acquisition and exclusive enjoyment lay upon the defendant, and that in the absence of such proof the presumption was in favour of the plaintiffs. He therefore reversed the decree and awarded the plaintiffs' claim. On appeal to the High Court,

*Held* (reversing the decree and remanding the case for re-trial) that the burden of proof lay on the plaintiffs. It was for them to show that the purchase had been made out of ancestral funds and they were also bound to prove that they had been in receipt of their share of the income. That burden could not be shifted on to the defendant, who acquired the property and in whose name and possession it had admittedly been for years.

SECOND APPEAL from the decision of R. Knight, District Judge of Sátára, reversing the decree of Ráo Sáheb Átmárám J. K., Second Class Subordinate Judge of Vita.

Suit for partition. The parties belonged to different branches of the same family, being descended from a common grandfather. In 1898 the plaintiff brought this suit, claiming a share in the income of a certain inám village which had been bought by the first defendant in 1873. The first defendant was registered in the Government record as the proprietor of the income of the village.

It was proved that there had been a partition of the family property in 1879.

The first defendant pleaded that the property was his self-acquired property and also that the claim was barred by limitation. The other defendants admitted the claim.

The Court of first instance dismissed the suit.

* Second Appeal No. 449 of 1900.

1900.

VINAYAK NARSINVH v. DATTO GOVIND.

In appeal the District Judge held that it lay on the defendant to prove (*a*) that the property had been acquired with his own funds, and (*b*) that he had had exclusive enjoyment of it; and that in the absence of such proof the presumption was in favour of the plaintiffs. He therefore reversed the decree and allowed the plaintiffs' claim.

The first defendant appealed to the High Court.

*Daji A. Khare* for appellant.

*Balaji A. Bhagwat* for respondents.

RANADE, J.—It appears to us that the District Judge has relied too exclusively on presumptions, and has not based his findings on a consideration of the evidence produced in this case by both parties. The District Judge seems also to have placed the burden of proof on the wrong party.

Plaintiffs sued to recover a fourth share in a certain inám village, or rather in the income of the said village, which was admittedly purchased by the first defendant's father so far back as 1873 in execution of a mortgage decree in his favour. Plaintiffs and defendants are near relations, representing different branches descended from one grandfather. According to the plaintiffs, the partition took place seven or eight years before suit, and they claimed the share of the village as ancestral property. The defendants, other than defendant 1, admitted the claim.

Defendant 1 claimed to have purchased the property in 1873 with his own funds, and to have been exclusively in possession ever since. The Court of first instance upheld this contention. It held that the partition took place twenty-four or twenty-five years ago, and that the purchase was made subsequent to the partition. In appeal the District Judge found it proved that the partition took place in 1879, and as the purchase was made in 1873, he held that the property must be regarded as ancestral, inasmuch as defendant had not shown that it was acquired out of his own funds. This was not the only presumption made in the case.

The next presumption made was that as defendant 1 was the Kulkarni, he had sole charge of the records, and those records would contain no evidence of plaintiffs' receipt of their share of

the money, and that therefore, until defendant showed affirmatively that he had exclusive enjoyment, plaintiffs were not bound to show that they had received their share of the profits from 1879 to 1898. It was accordingly presumed that plaintiffs were in receipt of their share of the income, as defendant had failed to discharge the burden of proof that lay on him. The evidence filed in the case was not referred to in the judgment on either of the points noted above.

Findings of fact based on a long chain of presumptions of this kind can never be satisfactory. The District Judge should have found expressly that the purchase of the village was made out of ancestral property and not from the private funds of the defendant. It does not always follow that because the members of a family have not separated, no member among them could come into possession of self-acquired property. As both parties admitted partition, and the partition was proved to have taken place in 1879, it is obvious that plaintiffs were bound to prove positively that they were in receipt of their share of the income. This burden cannot be shifted on to the defendant who acquired the property, and in whose name and possession it admittedly has been for these twenty-one years. We would draw the attention of the District Judge to the decision in *Ramchandra* v. *Narayan*.[1]

As we are unable to accept the findings, we reverse the decree of the lower Appellate Court, and remand the case for re-trial after laying down the proper issues on the lines stated above, and placing the burden of proof on the right parties. Costs to abide the result.

*Decree reversed and case remanded.*

(1) (1886) 11 Bom. 216.

# APPELLATE CIVIL.

*Before Mr. Justice Ranade, Mr. Justice Crowe and Mr. Justice Whitworth.*

1900.
*November* 30.

IN RE MEGHA AND OTHERS.*

*Indian Stamp Act (II of 1899), schedule I, articles 32 and 40—Mortgage—Further charge—Stamp.*

Certain property was mortgaged with possession for Rs. 180 by a deed of mortgage dated 23rd May, 1895. The deed was on a stamp paper of Rs. 2 (two). On 23rd August, 1899, the same property was re-mortgaged to the same mortgagee for Rs. 250, made up of Rs. 180, the consideration for the former deed, and another sum of Rs. 70 due to the mortgagee. This second deed was written on a stamp paper of Re. 1.

*Held*, that the second deed was not intended to operate merely as a further charge, but as a new mortgage in which the previous one merged, and that it should therefore be stamped as a mortgage-bond with possession for Rs. 250.

REFERENCE under section 57 of the Indian Stamp Act (II of 1899), by F. S. P. Lely, Esquire, Commissioner, N. D.

The reference was in the following terms:—

"Megha Ada and his two brothers mortgaged with possession their field situate in the limits of Mouje Kaligooa, táluka Viramgám, to Agarsing Jalamsing for Rs. 180, and passed a deed of mortgage on 23rd May, 1895, on a stamp paper of Rs. 2. The deed was duly registered.

"The same executants re-mortgaged the same field to the same mortgagee for Rs. 250, which consideration was made up of the said Rs. 180 and other debt of Rs. 70 due to the mortgagee. The mortgage-deed was executed on 23rd August, 1899. The stamp duty paid on this was Re. 1 only.

"The document having been produced for registration, the Sub-Registrar impounded and forwarded it to the Collector under section 33 of the Stamp Act, in order to decide whether the stamp duty paid was sufficient.

"The Collector referred the question for the opinion of the Government Pleader, and the latter opined that the duty paid was sufficient, holding that the instrument was one of further charge on mortgaged property, and therefore fell under article

* Civil Reference, No. 20 of 1900.

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IN RE MEGHA.

32 of schedule I of the Indian Stamp Act. The Collector endorsed the instrument accordingly and returned it to the Sub-Registrar through the District Registrar. The latter officer, instead of sending it on, returned it to the Collector for re-consideration, pointing out that by the execution of the mortgage-deed of 23rd August, 1899, that of 23rd May, 1895, had lost its force, that it was worded accordingly, that it was no instrument of further charge, that the amount secured thereby was Rs. 250, that such instruments were always treated as mortgage-deeds, and stamp duty and registration fee were levied accordingly, that if it be held to be a deed of further charge, Government revenue would suffer and that it was chargeable with a stamp duty of Rs. 3.

"The Collector again consulted the Government Pleader, who said that as the District Registrar was for Rs. 3 stamp duty, it might be levied.

"The Collector has therefore referred the matter to me.

"The question for decision is whether the duty of Re. 1 paid on the fresh mortgage-deed is sufficient or not.

"The landed property secured by the mortgage-deed is continued in the possession of the mortgagee in satisfaction of an account debt of Rs. 70, which is practically a further charge on the property mortgaged. The instrument therefore seems to fall under article 32 (*a*) of schedule I of theGeneral Stamp Act, and is liable to a stamp duty of Re. 1.

"As the point is not quite clear and as the decision in this case will govern future similar cases, that matter should be referred for the decision of Her Majesty's High Court of Judicature at Bombay (section 57 of the Indian Stamp Act)."

The mortgage deed of Rs. 250 was as follows:—

(Translation.)

"We have mortgaged to you pasaetu field 1 in number belonging to us for Rs. 250, namely two hundred and fifty of the Bombay currency. The said field is situate within the sim (field limits) of the village of Mouje Kaliana, Sub-Tukdi táluka Viramgám, Tukdi Zilla Ahmedabad. The particulars of the four boundaries thereof are as follows:

(Here the description of the boundaries is given.)

"The field situate within the aforesaid four boundaries together with the border lands and embankments in accordance with its original limits. The same is entered in the Government records in the name of our uncle, Gadhvi Jibhai

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*IN RE* MEGHA.

Dungar. The same was at first in the possession and enjoyment of our father who used to cultivate the same, and after his death the same was in our possession and enjoyment by right of heirship and we used to cultivate the same. And from the time the same was mortgaged to you on the 14th of Vaisakh Vad of Samvat 1951 (corresponding with the English date the 23rd of May in the year 1895) for Rs. 180 and was handed over in your possession, up to this day the same has been in your possession and enjoyment and you have been enjoying the income thereof. The very same field has again this day been mortgaged to you and (possession thereof) has been handed over to you by this deed of mortgage, and we have given the same to you in mortgage for the above mentioned Rs. 250. No interest is to be paid in respect of the said rupees, and in consideration thereof no vaje or ghas (grass) has to be claimed in respect of the said field. The period in respect thereof is fixed at 1, namely one year, at the expiration of which period the said field can be redeemed at the time of furrowing for sowing cotton pods on the amount being paid off. Therefore up to that time you are to cultivate and get others to cultivate or sub-mortgage the said field or sell off your mortgage right to another person, or deal with your said mortgage right in any way you may please. We nor our heirs and representatives are to cause any sort of objection in injury to you and your heirs and representatives, and should any one cause any obstruction or raise any objection or raise any claim against you in respect of the said field, we and our heirs and representatives are to answer for the same amicably. And we have taken the above mentioned mortgage sum of Rs. 250 in accordance with the following particulars:—Rs. 180 were payable in respect of your mortgage right on the said field on the said date and Rs. 70 have been caused to be credited in respect of the debt due by us to you under an account. In this way we have received Rs. 250 in all and we have given this mortgage-deed in respect thereof of our free will and pleasure and in sound and conscious state of our minds. The same is valid. And as to the salami payable to the Sarkár for the field the same is on you as long as the field remains mortgaged with you. You are to pay the same."

There was no appearance for any of the parties.

RANADE, J.:—On reading the bond of Rs. 250, it seems clear that it was not intended to operate merely as a further charge under a still subsisting mortgage, but as a new mortgage for Rs. 250 in which the previous one merged. It should therefore be stamped accordingly as a mortgage-bond with possession for Rs. 250.

*Order accordingly.*

# APPELLATE CIVIL.

*Before Mr. Justice Ranade, Mr. Justice Crowe and Mr. Justice Whitworth.*

LAXUMIBAI (PLAINTIFF), *v.* GANESH RAGHUNATH (DEFENDANT).* 1900. *November* 30.

*Stamp Act (II of 1899), article I, schedule I—Acknowledgment—Stamp—Agreement.*

Plaintiff sued upon an acknowledgment passed by the defendant to the following effect :—

"This day rupees two hundred and forty-one I received. The interest thereon is by agreement fixed to be at the rate of Re. ¾ per cent per month. This is the account in respect of the same."

The acknowledgment bore an anna stamp.

*Held*, that the above acknowledgment was an agreement and as such required an eight-anna stamp.

THIS was a reference by Ráo Sáheb B. S. Joshi, Second Class Subordinate Judge of Mahád, under section 60 of the Indian Stamp Act (II of 1899).

Plaintiff sued upon an acknowledgment signed by the defendant on 16th January 1900.

The acknowledgment bore an adhesive stamp of one anna and ran as follows :—

"The account given in writing to Laxumibai, widow of Rango Raghunath Chitre, inhabitant of Mahád, by Ganesh Raghunath Tipnis, inhabitant of Mahád, is as written below :

"Ganesh Raghunath Tipnis, inhabitant of Mahád, táluka Mahád.

Cr._____Rs. Dr._____Rs.

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The lunar date—the 1st of Poush Vadya, the English date the 16th of the month of January of the year 1900—On this day rupees two hundred and forty-one I received. The interest thereon is by agreement fixed to be at the rate of Re. ¾ per cent per month. This is the account in respect of the same."

With reference to this acknowledgment the Subordinate Judge of Mahád made the following reference :—

* Civil Reference No. 15 of 1900.

1900.

LAXUMIBAI v. GANESH RAGHUNATH.

"The plaintiff has brought this suit to recover Rs. 241 principal and Rs. 11-1-2 interest on an acknowledgment signed by the defendant on 16th January 1900.

"The acknowledgment mentions the fact of interest at 12 annas per cent per month having been agreed upon, but contains no express stipulation to pay. In the Stamp Act passed last year (Act No. II of 1899) the following proviso has been inserted in article 1 of schedule 1:

'Provided that such acknowledgment does not contain any promise to pay the debt or any stipulation to pay interest or to deliver any goods or other property.'

"This proviso is an improvement upon the Stamp Act of 1879, which did not contain it. The Legislature however, while excluding acknowledgment containing a promise to pay the debt or a stipulation to pay interest or to deliver goods or other property from the applicability of article 1 of schedule 1, has neither said within the category of what documents or instruments they are to be placed, nor has it specified the amount of stamp duty leviable on them. It need not be said that the proviso as regards interest being intended to be an exception to section 23 is not controlled by it. Further, it seems from the definition of the word 'instrument' given in clause 14 of section 2 of the Act that an acknowledgment is not intended to be included within it.

"Now the acknowledgment sued on cannot be held to be a bond, for, besides being unattested, it creates no express obligation and contains no express promise to pay. It is true that the definition of the word 'bond' as given in the Act is not exhaustive, but the very word 'bond' in its etymological as well as general sense conveys the idea of an express obligation, similarly the acknowledgment cannot be treated or dealt with as a promissory note, for the essential element of the latter, *viz.* a promise to pay, is absent. The above being my difficulties, I think the only possible way of escape is to treat the acknowledgment as such and as falling within article 1 of schedule 1, in spite of the reference to the rate of interest which it contains. All fiscal enactments must be construed strictly, and inasmuch as the acknowledgment in question contains no express stipulation to pay interest, it must be held that it is not affected by the proviso to article 1 of schedule 1 of the Act. It might

be urged that if it does not contain an express promise to pay, it at least implies such a promise. But if such a contention were allowed, even a bare acknowledgment would not come within the purview of article 1 of schedule 1, because every acknowledgment must imply a promise to pay, and more especially when it is obtained to supply evidence of money lent and advanced. For the above reasons I refer the following question for the opinion of the Honourable High Court:

'Whether the acknowledgment relied on is sufficiently or insufficiently stamped, and if the latter, what is the amount of stamp duty leviable on it.'

"My opinion on the above question is that the acknowledgment is sufficiently stamped, for reasons already set forth above. I am, however, not sure of the correctness of my opinion, and hence the necessity for this reference."

The reference was argued before Ranade, Crowe and Whitworth, JJ.

Ráo Bahádur *V. J. Kirtikar*, Government Pleader, for Government.

There was no appearance for either party.

*Per curiam*:—It seems to us clear that the acknowledgment in question must be treated as an agreement. The provision about interest has reference to the future, and is not covered by the past acknowledgment. The addition of the proviso in the new Act seems clearly to have been made to remove all doubts suggested by the decisions on the old article. As an agreement the document will have to pay 8 annas stamp.

# APPELLATE CIVIL.

*Before Mr. Justice Ranade, Mr. Justice Crowe and Mr. Justice Whitworth.*

1900. November 30.

## *In re* The HIMAT PROVIDENT SOCIETY, LIMITED.*

*Indian Stamp Act (II of 1899), schedule I, article 47 (d)—Certificate of membership—Policy of life insurance.*

The certificate of membership of a Provident Society was to the following effect :—

"You have, on condition of your conforming to the rules and regulations of this society from time to time in force, insured your life in the class of this society at the age of .

"The name of Mr. , residing at , has been registered as that of the person to whom the amount due under the rules of this society after your death should be paid."

*Held*, that the above certificate was a policy of life insurance within the meaning of article 47 (*d*) of Act II of 1899, and as such liable to pay *ad valorem* duty.

Reference under section 57 of the Indian Stamp Act (II of 1899), by F. S. P. Lely, Esq., Commissioner, Northern Division.

The reference was in the following terms :—

"A company called the Himat Provident Society, Limited, has been formed at Nadiád (Kaira District) for the purposes of insurance of lives of its members and distribution of profits among them &c.

"The question whether the certificate of membership of the company was chargeable with a stamp duty of one anna under article 17 of schedule I of the Indian Stamp Act I of 1879 having been submitted to the Collector for decision (probably under section 30 of the said Act), he was of opinion that as the certificate specified the share held by a member of the company it was *primâ facie* evidence of the title of the member to the share therein specified under section 54 of Act VI of 1882, and that therefore it was liable to a stamp duty of one anna; but as he felt doubtful he referred the matter to me on 31st March 1899 under section 45 of the Act. I replied on the 24th April following that the certificate was liable to a stamp duty of one anna under article 17 of schedule I of Act I of 1879.

"On 15th May 1899 he submitted the question for my reconsideration, stating as under—

"On a second reading of the certificate in question I find that it is not a certificate of the particular matters described in article 17 of schedule I of the

* Civil Reference, No. 22 of 1900.

Stamp Act of 1879, inasmuch as it does not give the member any title to any *share, scrip,* or *stock* in or of the company or association. I overlooked this point when I made the first reference. As stated in paragraph 2 of my No. 1876, dated 31st March last, the certificate of membership guarantees payment of the amount of money admissible under rules of the company after the death of the holder or of the person insured, such an instrument, although styled 'certificate,' is a policy of life insurance pure and simple and therefore chargeable with *ad valorem* stamp duty under article 49 (*c*) of schedule I of the said Act (*vide* Madras Board's proceedings of the 5th February 1885, No. 381, and Madras Government order No. 377, dated the 27th March 1885). In these decisions a certificate of membership in the Madras Hindu Family Provident Society has been held to be a policy of life insurance.

"The other Collectors of the Division were consulted and they were of the same opinion, *i.e.* the certificate is a policy of insurance and was therefore liable to a stamp duty prescribed by article 47 (*d*) of schedule I of the Indian Stamp Act II of 1899.

"In Madras (Government order No. 377, dated 27th March, 1885,) it was ruled that the certificate was a policy of life insurance and therefore chargeable with *ad valorem* stamp duty under article 49 of the Indian Stamp Act I of 1879.

"The certificate entitles the person whose name is registered by the company to receive the amount of money admissible under the rules of the company after the death of the policy-holder. It therefore seems to be a policy of insurance (section 2 (19) (*b*) of Act II of 1899) and liable to an *ad valorem* stamp duty under article 49 of Act I of 1879 or article 47 (*d*) of Act II of 1899 (which latter section applies only to similar certificates passed since the coming into force of that Act)."

The Commissioner, N. D., referred the following question for the decision of the High Court:—

"With what stamp duty is the certificate of membership of the Himat Provident Society, Limited, chargeable."

The certificate was in the following terms:

(Translation of the certificate.)

Certificate of number____.

The Himat Provident Society, Limited.

Certificate of Membership.

Mr.____.

Address ____.

You have, on condition of your conforming to the rules and regulations of this society from time to time in force, insured your life in the class of this society at the age of

The name of Mr. , residing at , has been

1900.

IN RE HIMAT PROVIDENT SOCIETY.

registered as that of the person to whom the amount due under the rules of this society after your death should be paid.

Dated Nadiád___.

Compared by Karkun___.

___Director.

___Secretary and Manager.

*N.B.*—The certificate should be preserved as it should accompany death certificate.

The reference came on for argument before Ranade, Crowe, and Whitworth, JJ.

Ráo Bahádur *V. J. Kirtikar*, Government Pleader, against the reference.

*Per Curiam* :—We are of opinion that the certificate in question does not come under article 19, but falls under article 47 (*d*) of Act II of 1899, and is liable to pay *ad valorem* duty.

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## ORIGINAL CIVIL.

*Before Mr. Justice Crowe.*

1901.
*March* 11.

DICK AND OTHERS, PLAINTIFFS, *v.* DHUNJI JAITHA AND LUDHOO PREMJI, DEFENDANTS.*

*Civil Procedure Code (XIV of 1882), section 153—Joint debtors—Suit against several joint debtors—Judgment against one joint debtor who admits claim does not bar suit against others—Contract Act (IX of 1872), section 43—Partners—Practice—Procedure.*

In an action against two alleged partners, which came on as a short cause, one of the defendants admitted the claim and judgment was therefore passed against him for the amount claimed. The second defendant denied his partnership with the first defendant and his liability to the plaintiffs, and on his application the case as against him was transferred to the list of long causes and postponed. He then filed a supplemental written statement in which he pleaded that the cause of action alleged in the plaint was joint; that it had become merged in the judgment recovered against the first defendant and that further proceedings in the suit were therefore barred. A preliminary issue on this point was raised and argued.

*Held*, that the suit should proceed. In an action commenced against several

* Suit No. 14 of 1901.

joint debtors judgment recovered against one of them who admits the claim does not bar the further prosecution of the suit against the others.

HEARING on preliminary issues.

Suit against the defendants Dhunji Jaitha and Ludhoo Premji for the sum of Rs. 7,931, being the price of iron sold and delivered to them as partners.

On the 29th January, 1901, the case came on for hearing as a short cause. The first defendant (Dhunji Jaitha) appeared and admitted the claim and a decree was then passed against him for the full amount.

The second defendant filed a written statement denying that he was a partner with the first defendant (Dhunji Jaitha) and denying his liability to the plaintiffs. As against him the suit was on his application transferred to the list of long causes and postponed. He afterwards filed a supplemental written statement as follows:—

"This defendant without prejudice to the defence set forth in his original written statement says that the cause of action alleged in the plaint against the defendants was joint and one capable of being merged in a judgment recovered against one of the defendants, and that on the 29th of January, 1901, the plaintiff recovered judgment against the first defendant for the sum claimed in this suit in respect of such cause of action. This defendant therefore submits that the said judgment is a bar to further proceedings against this defendant in respect of such cause of action and that this suit should be dismissed as against him with costs."

It was subsequently ordered that the following issues should be tried as preliminary issues:

(1) Whether the judgment recovered in this suit on the 29th January, 1901, against the first defendant is not a bar to further proceedings against the second defendant.

(2) Whether the suit should not be dismissed with costs against the second defendant.

These issues now came on for trial.

*Inverarity* (with *Scott*, Acting Advocate General,) for defendant.

The suit cannot be continued against the second defendant. Judgment has already been passed against his partner, the first defendant. The joint debt has therefore become merged in the

1901.

DICK v. DHUNJI JAITHA.

judgment and the suit is at an end. *King* v. *Hoare*(1); *Kendall* v. *Hamilton*(2); *In Re Hodgson*(3); *McLeod* v. *Power*(4); *Hemendro Coomar* v. *Rajendrolall*(5); *Nuthoo Lall* v. *Shoukee Lall*(6); *Brinsmead* v. *Harrison*(7); *Gurusami* v. *Samurti*(8); *Rahmubhoy* v. *C. A. Turner*.(9) The latest case on the point is *Muhammad Askari* v. *Radhe Ram Singh*(10) in which it was held that the doctrine of *King* v. *Hoare* is not applicable in India, at all events in the mofussil. That decision is wrong and it is not binding on this Court.

*Lowndes* (with *Raikes*) for plaintiff.

In order to decide whether the rule in *King* v. *Hoare*(11) applies, it is necessary to ascertain whether it is a rule of law, or merely a rule of procedure. We say it is a rule of procedure. If so, we must take our procedure in India from the Civil Procedure Code (Act XIV of 1882), and section 153 of that Code is decisive on these preliminary issues. The procedure in England may be different, but in India we are bound by that section. Is this rule then a rule of procedure? In *Kendall* v. *Hamilton*(12) it is so called by Lord Penzance (pages 525 and 530 of the report) and by Lord O'Hagan (page 534). The case of *McLeod* v. *Power*(13) confirms the view that the rule is a mere rule of procedure. Reference is there made to two of the English rules of procedure, *viz.* order XIII. rule 4, and order XIV. rule 5, which (it was said) created certain exceptions to the rule laid down in *King* v. *Hoare*. It was held that *McLeod* v. *Power* did not fall within these exceptions: that these special rules did not apply, and that therefore the general rule of *King* v. *Hoare* applied. We contend that if the rule in *King* v. *Hoare* is the general rule in India, then section 153 of the Civil Procedure Code (like the English rules just mentioned) creates exceptions to it, and that this case falls within that section and is an exception. See also

(1) (1844) 13 M. & W. 490.
(2) (1879) 4 Ap. Ca. 504.
(3) (1885) 31 Ch. D. 177.
(4) (1898) 2 Ch. 295.
(5) (1878) 3 Cal. 353.
(6) (1872) 10 Beng. L. R. 200; 18 Cal. W. R. 458.
(7) (1872) L. R. 7 C. P. 547.
(8) (1881) 5 Mad. 37.
(9) (1890) 14 Bom. 408.
(10) (1900) 22 All. 307.
(11) (1844) 13 M. & W. 490.
(12) (1879) 4 Ap. Ca. 504.
(13) (1898) 2 Ch. 295.

*Weall* v. *James*.[1] All the Indian cases cited are cases in which there were two separate suits, so that the present question is not covered by Indian authority. The case of *Hemendro Coomar* v. *Rajendrolall*[2] was decided upon the supposition that the rule in *King* v. *Hoare* was a rule of law, and not a rule of procedure. But *Kendall* v. *Hamilton*[3] in which Lords Penzance and O'Hagan expressed their views had not then been decided.

Our first point thus is that the rule in *King* v. *Hoare* is in India excluded by section 153 of the Civil Procedure Code and does not apply.

Next we say that having regard to section 43 of the Contract Act (IX of 1872) that rule does not apply. The basis of the rule in *King* v. *Hoare* is that the liability of partners is joint. That is the law in England. By English law, if one of two joint contractors was sued he might plead in abatement and the suit abated, but the right to sue remained, and a fresh suit might be brought. But if judgment was obtained against one of two joint contractors the cause of action was exhausted.

But where liability is joint and several, separate suits will lie against the debtors and judgment against one cannot effect the right to sue another. Section 43 of the Contract Act has made the liability of partners in India joint and several. *Motilal* v. *Ghellabhai*[4]; *Lukmidas Khimji* v. *Purshotam*[5]; *Muhammad* v. *Radhe Ram*.[6]

Lastly we ask that, if the Court should be against us on the two points we have raised, the proceedings in this case against the first defendant and the judgment against him should be set aside, and that we be allowed now to proceed against both defendants. *Munster's Case*.[7]

*Inverarity* in reply.

The judgment and proceedings against the first defendant cannot now be set aside. An application might have been made to do this before the order for a hearing on the preliminary issues

(1) (1893) 68 L. T. 54.
(2) (1878) 3 Cal. 353.
(3) (1879) 4 Ap. Ca. 504.
(4) (1892) 17 Bom. 6.
(5) (1882) 6 Bom. 700.
(6) (1900) 22 All. 307.
(7) (1885) 10 Ap. Ca. 680 at p. 689.

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was asked for and obtained. The order cannot be made now. The first defendant is not here and has had no notice of this application. But in any event the application would be useless. *Hammond* v. *Schofield*.[1] A right cannot be resuscitated.[2] To set aside the judgment would be to revive a right that is gone.

The rule in *King* v. *Hoare* is not a rule of procedure. See Lord Blackburn's judgment in *Kendall* v. *Hamilton*.[3] Section 153 of the Civil Procedure Code does not prevent the second defendant from raising the point on which he now relies. All the cases are in his favour except *Muhammad* v. *Radhe Ram*,[4] which is wrong. In England one joint contractor may be sued alone, but he can apply to have his co-contractor joined with him. Order XVI. rule 11, and Civil Procedure Code, section 32. The law is the same in England and India. *Lakshmishankar* v. *Vishnuram*,[5] *Robinson* v. *Geisel*.[6]

CROWE, J. :—The preliminary issues raised in this suit are—

(1) Whether the judgment recorded against first defendant in this suit on 29th January, 1901, is not a bar to further proceedings against second defendant.

(2) Whether the suit should not be dismissed against the second defendant with costs.

This is a suit against Marathi merchants for the price of certain iron sold and delivered to the defendants jointly who are alleged to have traded in partnership. On the 29th January, 1901, the defendants appeared and the first defendant admitted the claim. The second defendant applied for an adjournment, which was granted on certain terms and judgment was passed against the first defendant. It is now contended on behalf of the second defendant that it being a joint cause of action, the debt has become merged in the judgment according to the maxim *Transiunt in rem judicatam* and that the rule laid down in *King* v. *Hoare*[7] and enunciated more clearly in the House of Lords' case (*Kendall* v.

(1) (1891) 1 Q. B. 453.
(2) *Odell* v. *Cormack* (1887) 19 Q. B. D. 223 at p. 228.
(3) (1879) 4 Ap. Ca. 504.
(4) (1900) 22 All. 307.
(5) (1899) 24 Bom. 77.
(6) (1894) 2 Q. B. 685 at p. 687.
(7) (1844) 13 M. & W. 494.

*Hamilton*[1]) and followed in number of subsequent cases applies to the present case. The judgment in *Kendall* v. *Hamilton* is a most instructive one on the point, not only because of the high authority from which it proceeded, but from the fact that the subject was treated in lengthy judgments by six of the Judges who heard the appeal, and that one Judge, Lord Penzance, dissented from the opinion of the majority.

It has been contended that their Lordships' ruling has been consistently followed in a number of Indian cases, among the most important of which are *Hemendro Coomar* v. *Rajendro Lall*,[2] *Gurusami* v. *Samurti Chinna*,[3] *Lukmidas Khimji* v. *Purshotam*[4]; and that the case of *McLeod* v. *Power*[5] is exactly on all fours with the present case. In the Calcutta case, Markby, J., remarked, after holding that the doctrine laid down in *King* v. *Hoare* was binding on the Courts in India: "If I am at liberty to enter upon the general question of convenience, I should hesitate much before applying to this country without any qualification the rule laid down in *King* v. *Hoare*."

It has been contended by Mr. Lowndes for the plaintiff, first, that the rule in *King* v. *Hoare* is a rule of procedure (and for that proposition he relies on the judgment of Lord Penzance and Lord O'Hagan in the case of *Kendall* v. *Hamilton* above referred to), and that being so the provisions of section 153, Civil Procedure Code, apply to the case and that the law as laid down in the Civil Procedure Code must be observed here in India. Secondly, he has argued that the rule in *King* v. *Hoare* was founded on the principle that a contract by a partnership in England was a joint contract, and not a joint and several contract —that in India since the passing of the Contract Act, 1872, the effect of section 43 of that Act is to convert such a joint contract into a joint and several one, and he relies further on the judgment of Strachey, C.J., in *Muhammad Askari* v. *Radhe Ram Singh*.[6] Their Lordships there held that the effect of section 43 of the Indian Contract Act, 1872, being to exclude the right of a joint contractor to be sued along with his co-contractors, the rule laid

(1) (1879) 4 Ap. Ca. 504.
(2) (1878) 3 Cal. 353.
(3) (1881) 5 Mad. 37.
(4) (1882) 6 Bom. 700.
(5) (1898) 2 Ch. 295.
(6) (1900) 22 All. 307.

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down in *King* v. *Hoare* and *Kendall* v. *Hamilton* is no longer applicable to cases arising in India (at all events in the mofussil) since the passing of the Act, and that a judgment, obtained against some only of the joint contractors and remaining unsatisfied, is no bar to a second suit on the contract against the other joint contractors. He further relies on an *obiter dictum* of the late Farran, C.J., in *Motilal* v. *Ghellabhai*,[1] who held in reference to section 43 of the Contract Act that "as far as the liability under a contract is concerned, it appears to make all joint contracts joint and several."

Now it is necessary to ascertain, as far as possible, the grounds on which the rule in *King* v. *Hoare* was arrived at. In *Kendall* v. *Hamilton* the reason for the rule was stated by Earl Cairns, L.C., to be (page 515) "the right of persons jointly liable to pay a debt to insist on being sued together." So also Lord Hatherley observed (page 522)—"Each of the co-contractors has a right to be sued and to have the matter settled at once, instead of its being settled piecemeal." So also in *In re Hodgson*,[2] Lord Bowen in considering the question, what was actually decided in *King* v. *Hoare* and *Kendall* v. *Hamilton*, explained the grounds of the rule as follows (page 188) :—"It is based, rightly or wrongly, on the idea that a joint-debtor has a right to demand, if he pleases, that he shall be sued at one and the same time with all his co-debtors. To enforce this right, he is only entitled to plead in abatement, but the right is one of considerable business value, and is so recognised by the law."

Now that being, by the clearly expressed opinion of one of the authorities, the basis of the doctrine, and in the present case the plaintiff having conformed to the view of the law on which the rule is based, and having brought his suit against both the joint co-contractors in one suit, the question arises, whether I am justified in extending the basis of the rule. Mr. Inverarity, who appeared for the defendants, says that I am, and he grounds his contention on the judgment of Byrne, J., in the case of *McLeod* v. *Power*.[3] There one joint-debtor had consented to judgment and it was held that the rule in *King* v. *Hoare* applied, where both

(1) (1892) 17 Bom. 6. (2) (1885) 31 Ch. D. 177.
(3) (1898) 2 Ch. 295.

joint-debtors were originally made defendants to and had entered appearance in the same action and judgment by consent had been obtained against one of them in that action. There can be no doubt that the decision in that case has extended the operation of the rule. Proceedings had been already taken against the other defendant in the same action. In *Weall* v. *James*[1] it was held that where joint contractors were sued and one only obtained leave to defend, the other submitting to judgment, the plaintiff could go on with the action against the former, effect being given to order XIV. rule 5. With the exception of these two cases, in all the cases cited both from the English and Indian authorities, a second action had been brought. Byrne, J., apparently bases his judgment on the fact that there is nothing in the rules which will enable him to draw a distinction between the case of separate actions being brought against the joint contractors and one single action being brought against them, and he treats the question as one of procedure; remarking that the rules do provide two cases for, what he terms, the non-observance of the rule. Those cases are where one of the co-defendants only had leave to defend and where plaintiff has obtained judgment by reason of default on the part of one of the defendants. If, therefore, I felt inclined to follow the authority of *McLeod* v. *Power*, I should have to follow it consistently throughout, and should apply the provisions of section 153 of the Civil Procedure Code, by which we are governed in India, which lays down as a matter of procedure that where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or fact, the Court may at once pronounce judgment for or against such defendant, and the suit shall proceed only against the other defendants. Mr. Justice Byrne referred to the possibility of its being a *casus omissus* in the English rule of procedure which it might be necessary to remedy hereafter, but in India fortunately the Legislature has not left the point unprovided for.

I prefer, however, to base my judgment in this case on the ground that the rule in *King* v. *Hoare* strictly construed does not

(1) (1893) 68 L. T. 54.

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cover the facts of the present case. The principle that a judgment recovered against a joint-debtor is a bar to a further action to be prosecuted against another joint-debtor does not, in my opinion, bar the prosecution of an action already commenced against the co-debtors jointly against the second of such joint-debtors from the fact that one joint-debtor has admitted judgment.

With regard to the argument based on the provisions of section 43 of the Contract Act, it seems to me that that section merely takes away the right of a joint-debtor to be sued jointly and to plead in abatement a right which was abolished in England by the Judicature Acts. It is still open to a defendant to apply to the Court for joinder of a person who ought to have been included in the action and, to use the words of Earl Cairns, L.C., in *Kendall* v. *Hamilton*,(1) "the application to have a person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed." Section 32 of the Civil Procedure Code gives the Court absolute discretion, either on application or *suo motu*, to dismiss or add parties.

It is not necessary to consider the question raised in the third portion of Mr. Lowndes' argument, whether the Court, as suggested by Blackburn, J., in *Munster* v. *Cox*,(2) would be justified in setting aside all proceedings after appearance in order to nullify the operation of the judgment against one defendant as a defence. But looking to the circumstances of this case I may say that if the necessity had arisen, I should have been tempted if such were possible to consider any application directed to that end.

For these reasons I hold that the judgment recorded against the first defendant in this suit on the 29th January, 1901, is not a bar to further proceedings in this suit against the second defendant, and that the suit should not be dismissed against the second defendant with costs. Costs of this preliminary issue to be borne by defendant 2.

Attorneys for plaintiffs :—*Messrs. Little & Co.*

Attorneys for defendants :—*Messrs. Virji and Madhavji.*

(1) (1879) 4 Ap. Ca. 504. (2) (1885) 10 Ap. Ca. 680.

# ORIGINAL CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice B. Tyabji.*

RANCHORDAS MOORARJI, PLAINTIFF, *v.* THE MUNICIPAL COMMISSIONER FOR THE CITY OF BOMBAY, DEFENDANT.*

1901. *January 25.*

*Municipal Act, Bombay City (Bombay Act III of 1888), section 527—Notice of suit when necessary—Refund of town duties—Limitation—Limitation Act (XV of 1877), schedule I, article 2.*

The plaintiff sued to recover certain town duties which he had paid on importing grain and sugar, but which under section 195 of the City of Bombay Municipal Act (Bom. Act III of 1888) he was entitled to have refunded on exporting them. He had applied for a refund in October, 1899, but his claim was rejected on the 21st February, 1900. The suit was filed on the 21st August, 1900.

Section 527 of the City of Bombay Municipal Act (Bom. Act III of 1888) prescribes that one month's notice shall be given of any suit intended to be brought in respect of any act in pursuance or execution or intended execution of the Act, or in respect of neglect or default in the execution of the Act, and article 2 of schedule II of the Limitation Act (XV of 1877) prescribes, as the period of limitation for such suit, ninety days from the date of the act or omission complained of. Due notice of the suit was therefore given, but the suit brought in pursuance of it was not filed until the 21st August, *i.e.* six months after the act complained of, *viz.* the refusal to refund. The defendant admitted the amount claimed and the plaintiff's right to be repaid it, but defended the suit on the ground that he, as Municipal Commissioner, had no authority to discharge a claim which was not legally enforceable, the suit being barred by limitation.

*Held*, (1) that section 527 of the Act did not apply and that no notice to the defendant of this suit was necessary. The defendant could not claim that his conduct had any relation to the execution of the Act if he knowingly and intentionally acted in contravention of its provisions. Here the amount payable by way of refund was ascertained and the plaintiff's right to recover it was admitted and the refusal to refund was a deliberate and conscious contravention of the provisions of the Act. In such a case it could not be held that the money was *bona fide* withheld in execution of the Act, and that being so, the defendant was not entitled to notice under section 527.

(2) That the suit was therefore not one of the class referred to in article 2, schedule II, of the Limitation Act (XV of 1877), and was not barred.

When it is provided in an Act that notice shall be given to the defendant of any suit intended to be brought in respect of an act done in pursuance or execution or intended execution of the Act or in respect of neglect or default in

* Small Cause Court Reference 11714 of 1900.

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its execution, such provision does not apply when the action is brought on a contract, for the conduct giving rise to the action is a wrongful act or omission under the contract as distinct from one in the execution of the Act.

CASE stated for the decision of the High Court under section 617 of the Code of Civil Procedure (Act XIV of 1882) by C. W. Chitty, Chief Judge.

"1. This is a suit brought by the plaintiff to recover from the defendant a sum of Rs. 68, being the amount of town duties, to the refund of which the plaintiff claims to be entitled under section 195 of the City of Bombay Municipal Act (Bom. Act III of 1888) and which refund has been refused by the defendant.

"2. The facts of the case are not in dispute, the only question being one of law, *viz.*, what period of limitation is applicable in such cases.

"3. Two applications were made by the plaintiff for refund of town duties: (1) No. 7268, dated 24th October, 1899, in respect of 514 bags of grain; and (2) No. 7463, dated 25th October, 1899, in respect of thirty bags of sugar. (Exhibits A and B.) The amounts due in respect of such refunds are Rs. 45-10-0 and Rs. 22 6-0, respectively, and it is admitted that, if plaintiff's claim is within time, he is entitled to payment of these amounts.

"4. The rules governing such refunds have been put in and will be found at page 39 of the book of Municipal Bye-laws. (Exhibit No. I.)

"5. The plaintiff's claim was rejected by the Municipal authorities on 10th February, 1900, but the rejection was not communicated to the plaintiff until the 21st February, 1900. It is conceded that the period of limitation, whatever it may be, will run from the latter date.

"6. The plaintiff, on the 21st July 1900, gave the defendant notice of his intention to file this suit. The notice was not received by the defendant until the 23rd July, 1900. The suit was filed on the 21st August, 1900.

"7. The question for their Lordships' decision will be—

(1) Whether this suit is barred by the provisions of the Limitation Act (XV of 1877), schedule II, article 2.

(2) Whether, under section 527 (1) (*b*) of the City of Bombay Municipal Act (Bom. Act III of 1888), notice was necessary before suit filed.

"8. I am of opinion (though not without doubt) that both questions must be answered in the negative. As to the first, I think that article 2 of schedule II of the Limitation Act could not apply at all to this case, being excluded by section 6 of that Act in favour of section 527 of the City of Bombay Municipal Act. That is a special local law of limitation which would oust the general law. As to the second, I think the case is governed by the principle laid down in the case of *Maneklal* v. *Municipal Commissioner*.[1] There seems to be no distinction between the obligation imposed on the Municipal Commissioner to pay the value of land under section 301 and the obligation to refund the amount of town duties imposed by section 195.

"9. I should mention that though the amount at stake in this suit is small, there are nine other suits pending for various amounts in which the same questions are involved. I am also told that the defendant has large sums in hand, the refund of which will depend on the decision of this case. I have stayed proceedings pending the return of this reference as required by section 618 of the Civil Procedure Code."

Section 527 of the Bombay Municipal Act (Bom. Act III of 1888) which requires notice of suit to be given is as follows:

"527. (1) No suit shall be instituted against the Corporation or against the Commissioner or Deputy Commissioner, or against any Municipal officer or servant, in respect of any act done in pursuance or execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act—

(*a*) until the expiration of one month next after notice in writing has been, in the case of the Corporation, left at the chief Municipal office and in the case of the Commissioner or of a Deputy Commissioner or of a Municipal officer or servant delivered to him or left at his office or place of abode, stating with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his attorney or agent, if any, for the purpose of such suit; nor

(*b*) unless it is commenced within six months next after the accrual of the cause of action.

(2) At the trial of any such suit—

(*c*) the plaintiff shall not be permitted to go into evidence of any cause of action except such as is set forth in the notice delivered or left by him as aforesaid;

(1) (1894) 19 Bom. at p. 194.

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(*d*) the claim, if it be for damages, shall be dismissed if tender of sufficient amends shall have been made before the suit was instituted, or if, after the institution of the suit, a sufficient sum of money is paid into Court with costs.

(3) Where the defendant in any such suit is a Municipal officer or servant, payment of the sum or of any part of any sum payable by him in or in consequence of the suit, whether in respect of costs, charges, expenses, compensation for damages or otherwise, may be made with the sanction of the Standing Committee from the municipal fund."

Article 2 of schedule II of the Limitation Act (XV of 1877) provides that for a suit "for compensation for doing or for omitting to do an act in pursuance of any enactment in force for the time being in British India," the period of limitation shall be ninety days from the date when the act or omission takes place.

If this clause applied to this suit, the plaintiff's claim was barred, the suit not having been filed until the 21st August, 1900, and the act complained of, *viz.* the refusal to refund, having taken place on the 21st February, 1900.

*Scott* (Acting Advocate General) for the Municipal Commissioner cited Bom. Act III of 1888, sections 195 and 527; Act XII of 1888; Limitation Act XV of 1877, sections 5 and 6 and schedule II, art. 2; *Maneklal* v. *Municipal Commissioner of Bombay* (1); Maxwell on Statutes (2nd Edition), page 575; *Couch* v. *Steel* (2); *Wilson* v. *Mayor &c. of Halifax*.(3)

*Robertson* for plaintiff cited *Chunder Sikhur* v. *Obhoy Churn*(4); *Poorno Chunder* v. *Balfour* (5); *Foat* v. *Mayor &c. of Margate*(6); *Flower* v. *Local Board of Low Leyton*(7); *Garton* v. *G. W. Railway*;(8) Addison on Contract, page 787; Limitation Act (XV of 1877), schedule II, art. 2; Starling's Limitation Act (4th Edn., 1900), pages 136, 137; *Mayandi* v. *McQuhae*(9); *Municipal Committee, Moradabad*, v. *Chatri Singh*.(10)

(1) (1895) 19 Bom. 407 at p. 417.
(2) (1854) 3 Ell. & Bl. 402 at p. 411.
(3) (1868) L. R. 3 Exch. 114.
(4) (1880) 6 Cal. 8.
(5) (1868) 9 Cal. W. R. 535.
(6) (1883) 11 Q. B.D. 299.
(7) (1877) 5 Ch. D. 346.
(8) (1858-59) Ell. Bl. & Ell. 837—850.
(9) (1873) 2 Mad. 124.
(10) (1876) 1 All. 269, 271.

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JENKINS, C.J.:—This is a case stated for our decision under section 617 of the Civil Procedure Code (Act XIV of 1882) by Mr. Chitty, the Chief Judge of the Small Causes Court.

The suit is to obtain a refund of town duties, and in defence the Municipal Commissioner has pleaded the bar of limitation and insufficient notice of action.

The facts might suggest the idea that the defence is technical, but I understand the defendant hesitates to discharge a claim not legally enforceable. Now the refund is claimable under section 195 of the City of Bombay Municipal Act, 1888, which provides as follows :—

"(1) When any article upon which town duty has been paid shall be exported from the city, the full amount of the duty so paid shall, subject to the provisions hereinafter contained, be refunded.

"(2) Such refunds shall be paid under such rules as the Commissioner, with the approval of the Standing Committee, shall from time to time frame in this behalf :

"(3) Provided that—

(*a*) no refund shall be paid on any article, other than timber or flour, not exported within six months, or on any timber not exported within twelve months, from the date of its exportation ;

(*b*) a refund shall be claimable on all flour exported from the city without proof of the importation of the same into the city, equal to seventy-five per centum of the amount of the duty at the time being leviable on the grain from which such flour has been prepared ;

(*c*) no refund shall be paid unless the same is applied for within one month from the date of exportation ;

(*d*) no refund shall be made of any less amount than five rupees ;

(*e*) no rule framed by the Commissioner under this section shall have effect unless and until it is confirmed by Government."

Therefore the refund is only to be paid under such rules as the section indicates. There are rules and they are referred to in the case. On an examination of them it appears that the amount claimable as a refund is only repayable on the performance of certain conditions specified in clauses (*a*) to (*g*) of the rule relating to the refund on export by sea of goods other than grain.

The final step is that the Auditor will make out a return as per form H, "and on presentation of receipt (form E) to the Chief Accountant, the claim, after comparison with return H, is paid."

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Now form H in this case has never been made out, so that there has not been the required comparison, and as a consequence the condition on which alone payment is to be made has not been performed. In strictness therefore neither of the referred questions arises, as the right to sue for the refund has not matured.

But then it is said on behalf of the defendant that this view of the case is not open, inasmuch as no such objection was or could be urged by the plaintiff, and that we ought to hear the case as though the preliminary conditions had been complied with. I am willing to dispose of the case on that footing, and, to ascertain what on that supposition would be the relative positions of the parties, it is necessary to see what would have been done if the assumption was in accordance with the fact. The plaintiff would have procured an examination of the goods; he would have calculated, formulated and carried in his claim: this claim would have been examined, the calculations checked, and ultimately the amount due to the plaintiff would have been settled and certified. The result would have been that there was an admission made by the person authorized in that behalf, that there was a definite sum due to the plaintiff and belonging to him: there would have been no uncertainty as to the amount payable or the plaintiff's right to be paid.

So we have to see whether under the circumstances notice would have been necessary. The section prescribing notice is 527, which is in these terms:—

[His Lordship read the section (*supra* page 389) and continued.]

Now it is well established that provisions of this sort do not extend to all suits against persons intended to be protected. This is amply illustrated by decisions of the English Courts on cognate provisions, which are a valuable guide to us in this respect. One principle of exception is thus stated by the late Lord Blackburn, while still a Judge of the Queen's Bench, in *Selmes* v. *Judge*,[1] where he says: "It has long been decided that such a provision as that contained in this section is intended to protect persons from the consequences of committing illegal acts, which are intended to be done under the authority of an Act

[1] (1871) L. R. 6 Q. B. 724 at p. 727.

of Parliament, but which by some mistake are not justified by the terms and cannot be defended by its provisions. . . . I agree that if a person knows that he has not, under a statute, authority to do a certain thing and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute." Again Mr. Justice Lush says (page 728-9): "It is clear they *bona fide* believed they were doing what the law allowed, and that is all that is needed to entitle them to the protection of the statute." Mr. Justice Hannen's remarks were to the same effect.

The result appears to me to be that the person seeking the protection of the Act cannot claim that his conduct has any relation to the "execution of the Act," if he knowingly and intentionally acts in contravention of its provisions. So here, if (as we have to assume) the amount payable by way of refund was ascertained and the plaintiff's right to receive it admitted, the refusal to refund would have been a deliberate and conscious contravention of the provisions of the Act. In such a case it would be impossible to hold that the money was *bona fide* withheld "in execution of the Act," and such conduct would fall precisely within the description given by Lord Blackburn as disentitling a person to notice. I do not say that this has actually been the conduct of the Municipal Commissioner; it has not; but it is what we have to attribute to him in acceding to the suggestion that we must treat this suit as though all the conditions precedent had been performed.

There is another mode of approaching this case. It is established that notice is not required where the action is brought on a contract: for the conduct leading to the action is a wrongful act or omission under the contract, as distinct from one in the execution of the Act; and it is the breach of a specific contract that is the occasion of the right to sue. On the other hand, the exemption from this requirement does not apply to all suits *in contract* as distinct from suits *on* contract. This is not a fanciful distinction; the rules of procedure have for historical reasons been so moulded that a tort may give rise to a suit in contract by the application of a fiction resulting in the implication of a contract, while in fact there was no contract. The reason why a suit of

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this class is not free from the condition of notice is, that the suit is not in respect of anything done in breach of a specific contract, but in respect of an act or omission in execution of the Act. The form of the procedure therefore is no guide to the character of the facts out of which the suit arises.

Having then arrived at these principles, I will consider whether on the required assumption it cannot be said that this would be suit on a contract. According to these required assumptions there would have been an examination and adjustment of the plaintiff's claim to refund and an admission of the amount due. This would have been such an admission and appropriation of the amount in question to the plaintiff's use as to support a suit on an account stated (cf. *Roper* v. *Holland* [1]), and it appears to me that such a suit would for the purpose I am now considering be undistinguishable from a suit on a specific contract, so that the requirement of notice would have no application (cf. *Garton* v. *G. W. Railway*).[2]

I have not overlooked the decision in *Shankar* v. *Mukta*,[3] but that case as well as those on which it proceeds appear to me to be based on the special character of a *ruzukhata* and the inference to which it gives rise.

In the view I take, article 2 in the second schedule of the Indian Limitation Act, 1877, obviously cannot be a bar, and I therefore am of opinion that both the questions should be answered in the negative. I am glad that I can so hold, for it relieves the defendant of the unpleasant duty of refusing on a technical ground to discharge a claim to the payment of which (according to the stated case) the plaintiff is admittedly entitled.

TYABJI J.:—I concur.

Attorneys for plaintiffs :—*Messrs. Unwalla and Pavri.*

Attorneys for defendant :—*Messrs. Crawford, Brown & Co.*

(1) (1835) 3 Ad. & Ell. 99. (2) (1858-59) Ell. B. & Ell. 837.
(3) (1896) 22 Bom. 513.

# *FULL BENCH.*

## APPELLATE CIVIL.

*Before Mr. Justice Candy, Mr. Justice Ranade, Mr. Justice Crowe and Mr. Justice Whitworth.*

SOM GOPAL BHOGALE (ORIGINAL DEFENDANT), APPLICANT, *v.* VINAYAK BHIKAMBHAT AND ANOTHER (ORIGINAL PLAINTIFFS), OPPONENTS.*

1900. *December* 3.

*Mámlatdár—Mámlatdárs' Courts Act (Bom. Act III of 1876), section 4—Natural water-course—Riparian proprietors—Obstruction to the flow of water—Injunction—Jurisdiction.*

*Held* by the Full Bench (Whitworth, J., dissenting) that a Mámlatdár has, under the Mámlatdárs' Courts Act (Bom. Act III of 1876), jurisdiction to inquire into a case in which it is alleged that an upper riparian proprietor has unduly interfered with the flow of water in a natural water-course from which a lower riparian proprietor also takes water.(1)

APPLICATION under the extraordinary jurisdiction of the High Court (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Ráo Sáheb R. R. Malji, Mámlatdár of Málvan, in a possessory suit.

* Application No. 97 of 1900 under the extraordinary jurisdiction.

(1) Section 4 of the Mámlatdárs' Act (Bombay Act III of 1876) :—

"4. Every Mámlatdár shall preside over a Court, which shall be called a Mámlatdár's Court, and which shall have power within such territorial limits as may from time to time be fixed by the Governor in Council to give immediate possession of lands, premises, trees, crops, or fisheries, or of any profits of the same, or to restore the use of water from wells, tanks, canals, or water-courses, to any person who shall have been dispossessed or deprived thereof otherwise than by due course of law, or who shall have become entitled to the possession or restoration thereof by reason of the determination of any tenancy or other right of any other person in respect thereof.

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But no suit shall be entertained by a Mámlatdár's Court unless it be brought within six months from the date on which the cause of action arose.

*Illustration IV.*

A and B hold lands adjacent to a પાટ (pát) or કાસ (kás) or similar artificial water-course which has hitherto been exclusively used by B. A draws water therefrom. B may sue in the Mámlatdár's Court at any time within six months from the date on which A commences to take the water, for an injunction to prevent A from so doing."

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The plaintiffs, riparian proprietors, brought a possessory suit against the defendant, who was an upper riparian proprietor, in the Court of the Mámlatdár of Málvan, and prayed for an injunction restraining the defendant from causing obstruction to the flow of water of a natural stream, the water of which was used by the plaintiffs for the purposes of drinking, cooking and irrigation.

The defendant pleaded *inter alia* that the plaintiffs had no right to the water of the stream.

The Mámlatdár having allowed the plaintiffs' claim, the defendant applied under the extraordinary jurisdiction of the High Court, contending that the Mámlatdár had no jurisdiction to grant the injunction sought for, and a *rule nisi* was issued calling on the plaintiffs to show cause why the order of the Mámlatdár should not be set aside.

*H. C. Coyaji* appeared for the applicant (defendant) in support of the rule.

*Daji A. Khare* appeared for the opponents (plaintiffs) to show cause.

The case was originally argued before the Division Bench composed of the Chief Justice and Whitworth, J., when the following judgment was delivered :—

JENKINS, C.J. :—In this case the Mámlatdár of Málvan granted the opponents an injunction restraining the present applicant from causing obstruction to the water which the opponents had been in the habit of taking from a natural water-course.

It is objected that the Mámlatdár had no jurisdiction to grant such an injunction.

The parties are riparian proprietors, and have been in the habit of taking water each by means of a dam across the water-course. The ground of complaint was that the applicant had recently altered his dam in such a way as to unduly diminish the flow of water to the opponents' dam.

The question at issue has been considered by different Divisions of this Court in the cases of *Babaji* v. *Babaji* [1] and *Narayan* v. *Keshav*,[2] and has been decided differently in the two cases.

(1) (1897) 23 Bom. 47. (2) (1898) 23 Bom. 506.

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We therefore refer for the decision of a Full Bench the question :—

Whether a Mámlatdár has, under Bombay Act III of 1876, jurisdiction to enquire into a case where it is alleged that an upper riparian proprietor has unduly interfered with the flow of water in a natural water-course from which a lower riparian proprietor also takes water ?

The case being thus referred, it was argued before the Full Bench consisting of Candy, Ranade, Crowe and Whitworth, JJ.

*Coyaji* for the applicant (defendant) : —The question is whether the word "water-course" in section 4 of the Mámlatdárs' Courts Act includes a natural water-course or whether it is limited only to an artificial water-course. We submit that it refers only to an artificial water-course. There are two decisions on the point, namely, *Babaji* v. *Babaji*(1) and *Narayan* v. *Keshav*.(2) We rely upon the section. It specifically mentions wells, tanks and canals. These are all artificial. Consequently the term "water-courses" in the section would naturally mean artificial water-courses. There are four illustrations given to the section, and the fourth illustration mentions an artificial water-course and not a natural water-course. This circumstance also supports our contention. Illustrations explain the meaning of a section. If the Legislature had intended that a Mámlatdár should have jurisdiction over a natural water-course, it would have made some provision to that effect and would not have inserted the expression "artificial water-course" in the illustration. A Mámlatdár cannot go into complicated questions of the rights of riparian owners. Such questions may involve inquiry, not only as to the quantity of water but also as to quality, such as pollution of water.

The question is really one of easement, and a Mámlatdár has no jurisdiction to decide such a question. Such an injunction cannot be granted without inquiry into difficult questions such as the reasonableness of the use and the quantity of water to which each riparian proprietor is entitled. The Mámlatdárs' Courts Act does not contemplate the determination of such questions.

(1) (1897) 23 Bom. 47. (2) (1898) 23 Bom. 506.

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*D. A. Khare* for the opponents (plaintiffs) to show cause :—The cases cited do not show that the water-course must be artificial. The water-courses mentioned in those cases were natural. The referring judgment of the Division Bench does not allude to the point of artificial water-course. The intention of the Legislature in enacting the Mámlatdárs' Courts Act would be defeated if natural water-courses were excluded from a Mámlatdár's jurisdiction. The fourth illustration to section 4 of the Act cannot limit the water-courses mentioned in the section to artificial water-courses. Illustrations to a section cannot be used to construe the section—*Koylash Chunder Ghose* v. *Sonatun*.[1] The construction which is sought to be put would restrict the operation of the Act. In *Balvantrao* v. *Sprott*,[2] which was decided under the Act, the dispute related to a natural water-course between riparian owners. Although questions like the present are beset with difficulties, still that circumstance alone cannot deprive a Mámlatdár of his jurisdiction and cannot defeat the intention of the Legislature. The questions as to the reasonableness of the use and the quantity of water to be taken by the riparian owners can be inquired into by a Mámlatdár. Such questions are to be determined by taking evidence which a Mámlatdár is perfectly competent to do.

*Coyaji* in reply :—A Mámlatdár has jurisdiction with respect to physical possession only. The dispute in *Balvantrao* v. *Sprott*[3] was between riparian owners on one side and the officers of Government on the other.

CANDY, J. :—The question at issue has been referred for the decision of a Full Bench, because it has been decided differently by two Divisions of this Court in *Babaji* v. *Babaji*[4] and *Narayan* v. *Keshav*.[5] The case has been argued before us as if the difference between the two decisions rested on the distinction between an artificial and a natural water-course, and the wording of the reference suggests such a distinction. But a perusal of the earlier of the above noted two judgments shows that such a distinction was not present to the minds of the Judges who

(1) (1881) 7 Cal. 132.
(2) (1899) 23 Bom. 761.
(3) (1899) 23 Bom. 761.
(4) (1897) 23 Bom. 47.
(5) (1898) 23 Bom. 506.

decided that case. The words "artificial" or "natural" water-course do not occur in the judgment.

Confining ourselves to the words of the Act, and having regard to the well-known objects of the Act, there is no apparent reason why the word "water-course" in section 4 of Bombay Act III of 1876 should not be interpreted in its widest sense and include a natural water-course. The obviously main object, in investing Mámlatdárs with summary powers in dispute regarding possession, was to prevent agriculturists being illegally deprived of, or obstructed in, possession of their fields, and being thus driven into litigation in the ordinary Civil Courts, while their opponents reaped the benefits of their wrong-doing, and became defendants in possession challenging their plaintiffs to prove their title. So the Mámlatdárs were invested with summary powers *to maintain existing possession*. The only question for their consideration is "wahiwat" (the cases are known as "wahiwat cases" all over the country side), and they have nothing to do with title, or common law, or statutory law. In each case the question for decision is simply one of fact, actual possession within a certain period, and dispossession or obstruction to that possession otherwise than by due course of law. But in Bombay Act V of 1864 there was no mention of disputes regarding the use of water from wells, water-courses, &c., whereas a protracted dispute about the use of water at a critical period of the year might prevent a field from being cultivated at all, and a whole season's crop might be lost. Hence "the use of water from wells, tanks, canals or water-courses" was inserted in section 4 of Bombay Act III of 1876, and put on the same footing as possession of lands, &c. In every dispute about water the Mámlatdár's jurisdiction is still narrowed to the question of fact, *viz.* plaintiff's possession of the use claimed and defendant's deprivation of or obstruction to that use otherwise than by due course of law.

Having regard, then, to the manifest intention of the Act, there is no reason why the use of water from a water-course should be confined to water from an artificial water-course. The existing "wahiwat" may be to take, by turns or otherwise, the water of an old masonry water-course (as *e.g.* in the Násik District) or of a streamlet (as in the Ratnágiri District) or of an ordinary "pát" such as is common throughout the Presidency.

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Where is the difference in the fact of the "wahiwat"? The existing "use" may be for both A and B to erect dams across a streamlet in the hot weather, B's dam being constructed with a sluice of a certain size so that a supply of water reaches A's dam. This is the kind of "use" which was maintained in *Rakhma* v. *Tulaji*.[1] If that use is proved it is manifestly the intention of the Act that the Mámlatdár should maintain it, or enjoin against its disturbance. The illustrations to section 4 of the Act do not compel us to restrict the word "water-course" to an artificial water-course. Illustration III runs—"A allows B the use of water from his well or from his water-course &c." Illustration IV runs—"A and B hold lands adjacent to a *pát* or *káns* or similar artificial water-course, which has hitherto been exclusively used by B. A draws water therefrom &c." It would be an undue straining of the rules of interpretation to say that, because this latter illustration refers in terms to an artificial water-course, therefore the Mámlatdár's jurisdiction is confined to cases in which the question before him is as to the fact of a claimed use of water from an artificial water-course. There is no trace in the Act or elsewhere that the intention of the Legislature was that it was only a particular kind of "wahiwat" which the Mámlatdár was to regulate. The words are as broad as they can possibly be, and it would be defeating the object of the Legislature, and intensifying the evil which the Act was meant to remedy, if we say that though A may prove before the Mámlatdár that he has hitherto enjoyed the use claimed and that the sudden deprivation by B of that use will prevent him (A) from cultivating his field, yet A is shut out from his remedy under the Mámlatdárs' Act, because the use is of water from a *natural* water-course.

If the above proposition is correct, it follows that the Mámlatdár is not concerned with any Law of Easements or of Riparian Proprietors. His decision must be confined to fact: did plaintiff enjoy the use claimed? has it been disturbed? In *Fatmabibi* v. *Bhandari Pema*[2] there is a decision which at first sight seems to contradict the proposition above set out. But it is clear that this is not so, when the authority on which that

(1) (1894) 19 Bom. 675.

(2) P. J. for 1896. p. 592.

decision rests is examined. The report of *Fatmabibi* v. *Bhandari Pema* at page 592 of the Printed Judgments for 1896 runs :—

"Opponents brought this suit against the present applicants in the Court of the Mámlatdár for removal of an alleged obstruction to the flow of water caused by applicants. The judgment (Farran, C.J., and Hosking, J.) is—

We think that the Mámlatdárs' Act has been correctly interpreted by this Court in *Jaga Valabh* v. *Dahyabhai Monbhai*,(1) and that its provisions do not include the easement which the plaintiffs seek to have preserved to them by the Mámlatdár. It is to be regretted that the Legislature did not use expressions wide enough to include this privilege, but we cannot strain its language so as to make it include what it does not. Under these circumstances we think that the Mámlatdár has no jurisdiction in this case."

A reference to the record of this case in the High Court does not show what was the plaintiffs' claim in the Mámlatdár's Court. But a reference to the authority quoted in the above judgment shows that it could not have been simply against an obstruction of the use of water. For in *Jaga Valabh* v. *Dahyabhai*(2) the plaintiff complained to "the Mámlatdár that the right he had of passing water from the roof of his house and his ground on to, and having it carried away over, the land of the defendant had been obstructed by the act of the latter in building a shed on his (the defendant's) own land." It is obvious that the claim of the plaintiff to get rid of the water from his roof, &c., over defendant's land was not a claim to the use of water from any well, tank, canal or water-course. The matter is self-evident; but it does not follow that an act done by defendant on his own property, which causes an obstruction to the use claimed by plaintiff of the water from a water-course (natural or artificial) does not come within the jurisdiction of the Mámlatdár. Thus in *Balvantrao* v. *Sprott*(3) plaintiff was the owner of Survey No. 13, through which a natural water-course flowed. The neighbouring owner of Survey No. 17 erected in his own property a dam, which entirely obstructed the water from flowing down to plaintiff's Survey No. 13. Plaintiff succeeded, without question as to jurisdiction in the Mámlatdár's Court, and the dam was removed. In one sense the "wahiwat" which the plaintiff claimed, and

(1) P. J. for 1896. p. 340. (2) P. J. for 1896. p. 340.

(3) (1899) 23 Bom. 761.

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which was maintained, was an easement. The use was the use of the water from the streamlet, without obstruction from the neighbouring owner, or any one on his behalf, owing to something being done by that owner (or some one on his behalf) on his own property.

In the judgment in the above case (Parsons and Ranade, JJ.) there is no trace of a suggestion that the claim being of the nature of an easement was outside the jurisdiction of the Mámlatdár. On the contrary their Lordships said (pp. 765-66)—

"The Mámlatdár has nothing whatever to do with the law of the case; all he has to do is to determine three simple issues of fact. Admittedly there is a water-course" (a streamlet) "and there is a flow of water down that water-course the use of which the plaintiff claims. What therefore the Mámlatdár has to determine is—(1) whether the plaintiff is actually in possession or enjoyment of the property or use claimed, (2) whether the defendants are disturbing or obstructing or have attempted to disturb or obstruct him in such possession or enjoyment, (3) whether such disturbance or obstruction or such attempted disturbance or obstruction first commenced within six months before the suit was filed; and to pass a decree according to his findings thereon."

I entirely concur with the propositions so laid down in the above judgment. The Mámlatdár has nothing whatever to do with the law of the case.

But in *Babaji Ramji* v. *Babaji Devji*[1] the same Judges took an apparently contrary view. In that case the "wahiwat," which the plaintiffs sought to have maintained, was that they and the defendants, who were owners of lands through which a natural water-course flowed, erected dams so as to collect the water and irrigate their fields. There was no alleged custom of turns. The "wahiwat" alleged to exist was that the defendants' dam was always constructed with a sluice or passage in it of a certain size, so that a supply of water came down the water-course to plaintiffs' lands. The Mámlátdár raised the three simple issues of fact, and passed a decree accordingly, though he recorded no formal findings, *viz.*, he held in effect that the plaintiffs had been in possession of the use claimed, that defendants obstructed the same by building their dam without the passage above noted, and that such obstruction first commenced within six months

[1] (1897) 23 Bom. 47.

before the suit was filed. He therefore issued an injunction to defendants that "according to the wahiwat" they should have a sluice of a certain defined size in their dam. That was exactly the "use" or "wahiwat" which was held in *Rakhma* v. *Tulaji*[1] to have been rightly maintained.

This order was reversed by the High Court, who held (pp. 49-50) that the Mámlatdár had no jurisdiction, because—

"If A owns one portion of a water-course and B another, and if B takes from his portion more water than he is entitled to, so that a less amount flows down to A, we conceive no suit would lie in a Mámlatdár's Court, because A never was in possession of the use of the water in B's water-course and no obstruction has been caused to A's use of the water that might be in his water-course. If such a suit lay, then the injunction would have to be not merely that provided by schedule (C) of the Act, but an order on the defendant to do, or refrain from doing, something with his own property such as has actually been passed by the Mámlatdár in this case, for which no authority can be found in the Act. It is obviously undesirable that the nice questions which may arise between riparian proprietors as to the amount of water each can take from a stream should be determined by a Mámlatdár's Court. This really is the question at issue in the present case. It is not whether the plaintiffs have been obstructed in the use of water in their water-course, but it is whether the defendants have, by exceeding their rights as owners of land abutting on the stream, caused injury to other owners, the plaintiffs. We are of opinion that such a suit does not come within the Mámlátdárs' Courts Act."

With the greatest respect I am unable to agree with the above decision. On the facts as above stated, A was before suit in possession of the use of water coming from B's portion of the streamlet (water-course), and obstruction was caused by B to A's use of the water, which, had it not been for B's obstruction, would have been in his (A's) portion of the water-course. The form of the injunction provided by schedule (C) of the Act affords no ground for holding that the Mámlatdár has no jurisdiction in such a case. For the form does not even provide for a recital of the disturbance or obstruction which the defendant is prohibited from further making, and yet section 5 provides that the plaint shall state the nature of the injunction to be granted. The injunction which in *Balvantrao* v. *Sprott* (*supra*) the Mámlatdár was directed to issue, should he find on the issue in favour of the

(1) (1894) 19 Bom. 675.

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plaintiff, must have been that defendants should remove the dam which they had erected in Survey No. 17 in collusion with and on behalf of the owner of that survey number. If he alone had erected the dam and had been the defendant (as he was in the prior suit), he would by the injunction be directed to do or refrain from doing something with his own property, *viz.* refrain from building a dam in his own portion of the water-course so as to disturb the use hitherto enjoyed by the owner of Survey No. 13 of water in his (that owner's) portion of the water-course.

I entirely concur with the remark that it is obviously undesirable that the nice questions which may arise between riparian proprietors as to the amount of water each can take from a stream should be determined by a Mámlatdár's Court. But as shown by the judgment in *Balvantrao* v. *Sprott*, "the Mámlatdár has nothing whatever to do with the law of the case." He is simply the judge of fact: has defendant by his act deprived plaintiff of or obstructed plaintiff in the hitherto existing use? Whether that use is in accordance with the law regarding riparian proprietors is one for the Civil Court and not for the Mámlatdár; and it is open to the party who is unsuccessful in the Mámlatdár's Court to bring a suit in the ordinary Civil Court and have the question determined according to the law regarding riparian proprietors.

If the propositions which I have endeavoured to enunciate are correct, it follows that I entirely agree with the final decision of this Court in *Narayan* v. *Keshav*[1] that the Mámlatdár had jurisdiction to grant an injunction in that case, in which it was found that plaintiff had enjoyed the use of water flowing through the streamlet, that defendant had obstructed plaintiff in such enjoyment by digging a trench in his (defendant's) land and so diverting the water, and that therefore defendant was by injunction rightly directed to refrain from doing something with his own property, *viz.*, not to dig the trench in his own land. I also concur with the remark that the Legislature possibly thought that for water disputes a speedier remedy than the ordinary Courts can afford is often desirable in the interests of agriculture and for the preservation of the peace, the party dissatisfied with the Mámlátdár's decision being at liberty to seek redress

(1) (1898) 23 Bom. 506.

by a regular suit in the Civil Court. But with great respect I dissent from the proposition that the question as to the reasonableness of defendant's obstruction to plaintiff's use, by diverting the water, is one of fact to be decided by the Mámlatdár according to section 7 of the Easements Act or the law in regard to riparian proprietors. On the contrary, I hold that the Mámlatdár has nothing whatever to do with the law of the case. For the above reasons I would answer the question referred to us in the affirmative.

RANADE, J.:—The point referred to us is whether a Mámlatdár has jurisdiction under Bombay Act III of 1876 to inquire into a case where it is alleged that an upper riparian proprietor has unduly interfered with the flow of water in a natural water-course from which a lower riparian proprietor also takes water. The Division Bench made the reference, because it was of opinion that the decisions in *Babaji* v. *Babaji*[1] and *Narayan* v. *Keshav*[2] appear to have decided the point differently.

In the first of these cases the principal dispute was not as to actual disturbance or dispossession, about which there was no dispute in that case, but as to whether one proprietor should keep open a sluice in his own dam so as to permit water to go to the owner of a lower dam in the same stream more than sixty cubits distant. This was held to be not a dispute about possession cognizable by the Mámlatdár. In the next case—*Narayan* v. *Keshav*[3]—the dispute was as to an alleged disturbance caused by the actual diversion of the stream made by digging a trench which took away the greater part of the water from plaintiff's land to defendants' land. The Judges who decided this last case referred to the earlier decision on page 47, and distinguished it as being a peculiar case in which the parties relied on a particular custom about the use of water by turns. There was thus no conflict between the two cases.

The point arose again in *Balvantrav* v. *Sprott*[4] before the same Judges who decided *Babaji* v. *Babaji*,[5] and they held that

(1) (1897) 23 Bom. 47.
(2) (1898) 23 Bom. 506.
(3) (1898) 23 Bom. 506.
(4) (1899) 23 Bom. 761.
(5) (1897) 23 Bom. 47.

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the Mámlatdár had jurisdiction where the complaint was about the disturbance of the water-course. There is thus no real conflict of opinion on the point. The Mámlatdárs' Act makes no distinction between the use of artificial and natural water-courses. It does make a distinction between actual possession which is disturbed, and rights claimed as easements without actual possession. The latter class of rights, excepting a right of way to fields, does not come under the jurisdiction of the Mámlatdárs' Courts. If the use of water is disturbed or obstructed, the Mámlatdar has jurisdiction to restore possession, and the present case was therefore rightly decided.

CROWE, J.:—I am of opinion that a Mámlatdár has, under Bombay Act III of 1876, jurisdiction to enquire into a case where it is alleged that an upper riparian proprietor has unduly interfered with the flow of water in a natural water-course from which a lower riparian proprietor also takes water.

The Act makes no distinction between a natural and an artificial water-course. In the cases cited by the referring Bench the question at issue was one and the same and was differently decided. It is immaterial whether the obstruction to the use of the water by the plaintiff was occasioned by a dam or the closing of a sluice, or the digging of a trench or any other method by which the water was diverted. In *Babaji* v. *Babaji* [1] plaintiff alleged there had been a sluice or passage which defendants stopped up. The defendants denied the existence of such sluice or passage and the Mámlatdár found in the plaintiff's favour. By such stoppage the plaintiff was clearly *obstructed in the use of water of which he had been in possession,* to use the words of the Act. The Act takes no account of the *amount* of water and whether the obstruction affects the amount to the extent of one per cent. or ninety per cent.: in each case it is an obstruction to the use of the water and properly falls within the jurisdiction of the Mámlatdár.

I would answer the question in the affirmative.

WHITWORTH, J.:—This reference has been made on the ground of a conflict of decisions in *Babaji* v. *Babaji* [2] and *Narayan* v.

[1] (1897) 23 Bom. 47. [2] (1897) 23 Bom. 47.

*Keshav*[1] upon the question whether a Mámlatdár has jurisdiction under Bombay Act III of 1876 in a case where one riparian proprietor complains of undue interference by another with the flow of water in a natural water-course.

In the present case, as in the two just named, the question is solely as to a natural water-course. Neither in the judgments in those cases nor in the reference now before us is there any mention of an artificial water-course. Indeed, there is no doubt that in respect of an artificial water-course a Mámlatdár *has* jurisdiction; and the word "artificial" comes into the argument only when the question arises whether the word "water-course" in section 4 of the Act is confined to artificial water-courses or extends to natural water-courses also.

I am of opinion that the limited construction is the correct one. This opinion is based, first, upon the context. The words are, "any well, tank, canal, or water-course." These four words seem to be used as being *ejusdem generis*; nor is it easy to conceive how, if natural water-courses had been intended to be included, such very general and familiar words as "river" or "stream" should not have been used.

Secondly, though illustrations to enactments are not to be taken as exhaustive, and much is not to be made from omissions from illustrations, yet it may be noticed for what it is worth that the illustrations to section 4 mention four different kinds of water-supply, and all these four are in fact artificial. At least I so read them. They are "well," "water-course," "*pát*" and "*kás*." Three of these are clearly artificial; and where the term "water-course" itself is used an artificial one seems to be meant, for it is spoken of as belonging to A—"his water-course." Ordinarily a water-course which is private property is an artificial water-course.

Thirdly, it seems to me improbable that the Legislature should ever have thought of giving a Mámlatdár summary jurisdiction in the case of disputes about the taking of water from a river or other natural water-course. No doubt the questions to be determined would be only matters of fact—questions of actual use and actual obstruction; but they might be very difficult questions

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and very unsuitable for summary decision. Ordinarily the owners of an artificial water-course would be a small body of persons who had themselves, or whose predecessors in title had, constructed it. They would be well known to one another, and the rights and customary user of each one would be known from the day of construction. But in the case of riparian proprietors taking water from a natural water-course the conditions might be very different. For example in the case of *Babaji* v. *Babaji* (1) there were as many as six dams across the stream. In such a case one proprietor finding his supply of water to be less than usual might think his next neighbour had made his dam a little too high, but that owner might attribute the fault to the next above him, and so on; so that it might be a matter of difficulty even to determine who were the proper parties to the suit, while there would be no initial contract or understanding to refer to as a guide to subsequent practice. And the order to be passed might be an order directing the defendant to do something to his own property—lower a dam or enlarge a sluice—perhaps a mile away from the plaintiff's holding.

We know that till the passing of the present Act the Mámlatdár had no jurisdiction in respect of disputes about the use of water. The Legislature then, as I read the Act, thought it expedient to give him jurisdiction in the case of disputes among the owners, or persons claiming to be the owners, of wells or other constructed water-works. It would be going very far beyond this to give him similar jurisdiction in respect of disputes between independent proprietors as to the taking of water from streams or natural water-courses.

A third case, that of *Balvant* v. *Sprott*,(2) has been referred to in the course of argument; but of it it is sufficient to say that no objection to jurisdiction on the ground now in issue was taken in that case, and the question is not touched upon.

I would follow the ruling in *Babaji* v. *Babaji*, and reply to the reference in the negative.

The reference being answered in the affirmative, the rule was discharged with costs.

*Rule discharged.*

(1) (1897) 23 Bom. 47. (2) (1899) 23 Bom. 761.

# APPELLATE CIVIL.

*Before Mr. Justice Candy and Mr. Justice Whitworth.*

JAMSEDJI AND ANOTHER (ORIGINAL OPPONENTS 2 AND 3), APPELLANTS, *v.* BAWABHAI AND ANOTHER (ORIGINAL DEFENDANT AND OPPONENT 1 AND PLAINTIFF-APPLICANT), RESPONDENTS.*

1900. *December* 3.

*Surety—Liability, mode of enforcing—Civil Procedure Code (XIV of 1882), sections 545-546.*

The mode of enforcing payment by a surety who has rendered himself liable under section 545 (*c*) or section 546 of the Civil Procedure Code (Act XIV of 1882) is by a summary process in execution and not by means of a separate suit.

SECOND appeal from the decision of E. H. Moscardi, District Judge of Surat, confirming the decision of Ráo Sáheb M. B. Hora, Second Class Subordinate Judge at Surat.

One Makan Purshotam obtained a money decree against Bawabhai Dullabhbhai.

When Makan applied for execution of the decree, Bawabhai paid the money into Court, but applied that Makan should not be allowed to take the money out, without first giving security under section 546 of the Civil Procedure Code (Act XIV of 1882) as he (Bawabhai) intended to file an appeal against the decree. The application was granted and Nowroji Sorabji became surety for Makan, agreeing to abide by such order as the Appellate Court might ultimately pass. Nowroji, the surety, died in 1893. Jamsedji and Dinbai, the appellants, were his heirs and legal representatives.

The decree was reversed in appeal in 1894, and on 26th November, 1897, Bawabhai filed the present *darkhást* both against Makan and against Jamsedji and Dinbai, the heirs and legal representatives of Nowroji, the deceased surety, for a refund of the money which had been taken out of Court by Makan on furnishing security as above stated.

Jamsedji and Dinbai contended, *inter alia*, that Bawabhai

* Second Appeal, No. 399 of 1900.

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could not proceed in execution against the heirs and legal representatives of the deceased surety, but that his proper remedy was a regular suit.

The Subordinate Judge overruled this contention and ordered the execution to proceed.

This decision was upheld in appeal by the District Judge.

Thereupon Jamsedji and Dinbai preferred a second appeal to the High Court.

*H. C. Coyaji* for appellants:—The surety bond does not fall under section 546 of the Civil Procedure Code (Act XIV of 1882), for when it was executed no appeal was in existence. The section contemplates a case where an appeal is actually pending. The mode of enforcing a decree against a surety is not by a summary process in execution, but by a regular suit. In cases falling under sections 549 and 610 as amended by Act VII of 1888, the Legislature expressly provides that a surety shall be proceeded against in execution proceedings. The inference is that in other cases where no such provision is made the remedy is by a regular suit and not by a summary proceeding. The ruling in *Venkapa* v. *Baslingapa*[1] is in conflict with *Surjoo Das* v. *Balmakund*[2] and *Arunachellam* v. *Arunachellam*.[3] Having regard to these recent rulings, *Venkapa's* case ought to be reconsidered.

*Manubhai Nanabhai* for respondents:—The surety bond falls under section 546 of the Code of Civil Procedure (Act XIV of 1882), for at the date of its execution the appeal had actually been filed. Moreover, the bond has been all along treated as falling under section 546, and it is not now open to the appellants in second appeal to make a new case. Under section 253 of the Code, a surety for a defendant can be proceeded against in execution; and this section is *mutatis mutandis* applicable to a surety for a respondent under sections 582 and 583 of the Code. Sections 549 and 602 relate to security for costs provided by an appellant. It follows therefore that section 253 would not be applicable in such a case, and so sections 549 and 610 were

(1) (1887) 12 Bom. 411. (2) (1895) 3 Cal. 212.
(3) 891) 15 Mad. 203.

amended. But it does not follow from this that when security is given under section 546, the remedy against a surety must be by a suit and not by execution proceedings. The decision in *Venkapa's*[1] case is conclusive on this point.

CANDY, J.:—The facts of this case may be thus briefly stated. In 1884 Bawabhai obtained a money decree against Parshotam. In execution of that decree certain jewels and cash were attached. Parshotam's son Makan intervened and succeeded in raising the attachment of the jewels but not of the cash.

Makan then sued Bawabhai to have the cash declared to belong to him (Makan). He obtained a declaratory decree, but when, on Bawabhai having taken the money out of Court, Makan made an application to the Court, he was referred to a regular suit. So Makan sued Bawabhai for recovery of the money. He obtained a decree (6th October, 1891,) and on his applying for execution Bawabhai paid the money into Court, but made an application to the Court that Makan should not be allowed to take the money out without first giving security, as he (Bawabhai) was about to file an appeal against the decree awarding the money to Makan. This application was granted, and Nowroji executed a surety bond (23rd October, 1891) agreeing for himself, his heirs, and executors, with the Court to abide by the order of the appellate Court.

The Appellate Court reversed the decree which had been passed in favour of Makan, and the decree of the Appellate Court was confirmed by the High Court on 27th November, 1894.

On the 26th November, 1897, Bawabhai filed the present darkhást against Makan and against Jamshedji and Dinbai and others, the heirs of Nowroji (who had died in January, 1893), for restitution of the money which had, as shown above, been taken out of Court by Makan on furnishing security.

On 6th July, 1898, letters of administration were granted to Jamshedji and Dinbai as executor and executrix of the will of the said Nowroji. The darkhást was accordingly amended on 14th July, 1898.

(1) (1887) 12 Bom. 411.

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Jamshedji and Dinbai raised various pleas. The Subordinate Judge framed the following issues :—

1. Is the darkhást barred by limitation ?

2. Is the applicant Bawabhai entitled to claim a refund of the moneys in dispute ?

3. Is he entitled to claim interest ?

The Subordinate Judge found on issues 1 and 3 in the negative and on 2 in the affirmative. The point of limitation has been abandoned in this Court, and though Bawabhai filed a cross appeal in the District Court and cross objections in the High Court on the third point, it was not mentioned by the learned pleader in this Court.

On the second point the Subordinate Judge relied on the authority of the decision in *Venkapa* v. *Baslingapa*[1] and *Thirumalai* v. *Ramayyar*.[2]

On appeal made by Jamshedji and Dinbai the District Judge confirmed the order of the Subordinate Judge.

Jamshedji and Dinbai have now made a second appeal to this Court; and the first point taken by Mr. Coyaji on their behalf is that when Nowroji passed the bond (Exhibit 14) there was no appeal pending, and that thus there was no surety bond under section 546, Civil Procedure Code, and therefore in any case Bawabhai's sole remedy is by suit on the bond. This point had never before been taken in the lower Courts. It is possible that though the appeal had not been filed when Bawabhai applied that security should be furnished before Makan was allowed to take the money out of Court, yet when Nowroji executed the security bond, the appeal had as a fact been filed. The case has all along been treated as falling under section 546. A similar case is to be found in *Kusaji* v. *Vinayak*.[3] This report (taken with the reports of the case at prior stages at Printed Judgments for 1893 page 491 and Printed Judgments for 1895 page 227) shows that the surety bond in question was taken before the appeal had been actually filed, but there never was any question as to its falling within the provisions of section 546.

This brings us to Mr. Coyaji's second point. In *Kusaji* v. *Vinayak* just quoted (*supra*) the District Judge, following the

(1) (1887) 12 Bom. 411. (2) (1889) 13 Mad. 1.

(3) (1898) 23 Bom. 479.

Calcutta ruling in *Surjoo Das* v. *Balmakund Das*,[1] held that the liabilities of the surety could not be enforced in execution, but by separate suit. In appeal to the High Court, Parsons, Acting C.J., and Ranade, J., differed from that view. Parsons, Acting C.J., said :—"This High Court, however, has decided that the mode of enforcing payment by a surety is by summary process in execution, and not by means of a separate suit—*Venkapa Naik* v. *Baslingapa*".[2]

Mr. Coyaji asks us to reconsider that ruling, and to say that in the light of later decisions in other High Courts this Court has no alternative but to reject the darkhást and refer Bawabhai to a regular suit against the representatives of Nowroji (the surety).

No doubt it is the fact that Mr. Justice Muttasami Ayyar, who in April, 1889, held (*Thirumalai* v. *Ramayyar*[3]) that in the case of security given under section 546 the decree of the Appellate Court could be enforced in execution proceedings against the sureties under the provisions of sections 253, 583, yet in the later case (September, 1891) of *Arunachellam* v. *Arunachellam*[4] held in the case of a respondent in an appeal to the Privy Council giving security under section 646 (*b*) (analogous to a respondent in an ordinary appeal giving security under section 546) that section 253 could not be treated as incorporated in section 610, as shown by the addition to section 610 made by Act VII of 1888, and therefore the decree-holder's only remedy against the sureties was by regular suit. This is practically the view taken by a Calcutta Division Court in the case already noted (*Surjoo Das* v. *Balmakund*[5]) in the case of security given under section 546. Mr. Justice Prinsep, however, confessed that he would have had some difficulty in arriving at this conclusion if the matter had been *res integra*, but he thought it unnecessary, after the course of decisions in the Calcutta High Court, to express any dissent, more especially as the Code of Civil Procedure was then (August, 1895) under amendment, and the matter would probably attract the attention of those responsible for our legislation. Mr. Justice

(1) (1895) 23 Cal. 212.
(2) (1887) 12 Bom. 411.
(3) (1889) 13 Mad. 1.
(4) (1891) 15 Mad. 203.
(5) (1895) 23 Cal. 212.

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Ghose contented himself with adhering to prior decisions of the Calcutta High Court, namely (*a*) *Tokhan Singh* v. *Udwant Singh*,[1] a case of security given under section 545, and their Lordships relied simply on the authority of (*b*) *Kali Charun Singh* v. *Balgobind Singh*,[2] a case of security *for costs* given under section 549, and the High Court held (February, 1888, before the amending Act VII of 1888 came into force) that it was perfectly plain that, wherever the Legislature intended that a security bond might be enforced summarily without the intervention of a regular suit (as in the case provided for by section 336,) it has distinctly provided for it; but in the case of a surety who becomes a surety in an appellate Court no such provision is made; (*c*) *Radha Pershad Singh* v. *Phuljuri Koer*,[3] in which it was decided (in July, 1885) in the case of security *for costs* in an appeal to the Privy Council given under section 602, that section 253 was not incorporated in section 610, and the only remedy was by regular suit against the surety.

The majority of a Full Bench at Allahabad (*Bans Bahadur Singh* v. *Mughla Begum*[4]) had held (January, 1880) the contrary view in the case of security for costs furnished by an appellant in the Privy Council.

Having regard to the above decisions and to the obvious fact that when Act VII of 1888 became law, the reported decisions showed a difference of opinion between the Calcutta and Allahabad High Courts as to the remedy to be sought by a decree-holder against a person who stood *security for costs*, it may fairly be concluded that the additions made by Act VII of 1888 to sections 549 and 610 of the Civil Procedure Code were simply intended to put an end to that difference, and to provide that when a surety renders himself liable on behalf of an appellant for the costs of a respondent in an appeal, then such costs may be recovered in execution against the surety. But it does not follow that the Legislature intended that where a surety has rendered himself liable on behalf of an appellant for the due performance of the decree or order of an Appellate Court (section 545 (*c*)), or on

(1) (1894) 22 Cal. 25.
(2) (1888) 15 Cal. 497.
(3) (1885) 12 Cal. 402.
(4) (1880) 2 All. 604.

behalf of the respondent for the restitution of property and the due performance of the decree or order of the Appellate Court (section 546), in those cases the recovery should not be by proceedings in execution, but by regular suit against the surety. We have for so many years in the Bombay Presidency followed the reasoning of Mr. Justice West in 1887[1] in the case of *Venkapa Naik* v. *Baslingapa*, that we are not prepared now to assume that the reasoning has become valueless, because the Legislature in 1888, possibly for the sake of greater caution, made additions to sections 549 and 610, providing that a surety on behalf of the appellant for the respondent's costs may be proceeded against in execution just as if the surety was the appellant.

Mr. Manubhai, the pleader for Bawabhai before us, has called our attention to the words in section 253, "in the same manner as a decree may be executed *against a defendant*," showing that the apparent intention of the Legislature was to confine section 253 to the case in which *a defendant* has furnished security before the passing of a decree in an original suit, and (by the application of sections 582, 583), in appeals to the case in which *a respondent* has furnished security before the passing of the appellate decree. As under sections 549 and 602 the security for costs is furnished by the *appellant*, section 253 would be inapplicable, and therefore additions to sections 549 and 610 were necessary to specially provide that the costs may be recovered from the surety in the same manner as if he were the appellant. The argument is ingenious. Instances of defendants furnishing security before the passing of a decree in an original suit are to be found in the provisions of sections 477 to 480 (arrest before judgment) and of sections 483 to 489 (attachment before judgment). But then what are we to say of the case of a plaintiff in the course of a suit required to furnish security for costs under section 380 or 381? If the suit is dismissed with costs, was it expressly intended by the Legislature that in such a case the remedy against the surety could only be by separate suit? or is it a *casus omissus*? or does "a defendant" in section 253 simply mean the party against whom the decree has been passed? If Mr. Manubhai's argument is adopted, we shall have this anomaly: when a

(1) (1887) 12 Bom. at pp. 414, 415.

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*respondent* furnishes security under section 546, section 253 will be applicable: when an *appellant* furnishes security under section 545, section 253 will not be applicable. The subject is in some confusion. Thus, take the case of a Court to which a decree has been sent for execution requiring security from the judgment-debtor before staying execution, to enable the judgment-debtor to apply for stay under section 545 (sections 239, 240, and see Form XXI. Bombay High Court Circulars, p. 192); section 253 does not in terms apply, for the security is taken after decree; section 583 does not apply, because the security is taken under section 240 before application is made under section 545, and is quite distinct from the security furnished under section 545. Section 336 similarly applies to circumstances arising subsequent to the decree of the first Court and is not in the chapters relating to appeals: therefore there is a special provision in section 336 that in the case of a surety such security may be realised in manner provided by section 253. But there is no such provision in section 240. And yet there is no reason why a surety in the one case should not be subject to the same liabilities as in the other.

The view hitherto taken by the Bombay High Court with regard to sureties under sections 545, 546 is supported by the judgment of the Allahabad High Court in *Janki Kuar* v. *Sarup Rani*.[1] It is a violent assumption that the Legislature by the amendment in Act VII of 1888 of sections 549, 610, Civil Procedure Code, expressly intended that sureties might be proceeded against in execution *for costs*, but when the security is for due performance of the decree, the remedy against sureties must be by suit. There is no reason why there should be such a difference.

We therefore see no reason to depart from the practice of this Court; and we confirm the order and dismiss the appeal and the cross-objections with costs.

*Appeal dismissed.*

(1) (1895) 17 All. 99.

# APPELLATE CIVIL.

*Before Mr. Justice Candy and Mr. Justice Whitworth.*

SHANKARBHAI AND OTHERS (ORIGINAL PLAINTIFFS), APPLICANTS, *v.* SOMABHAI AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS.*

1900. *December* 4.

*Jurisdiction—Small Cause Suit—Subordinate Judge invested with Small Cause jurisdiction—Small Cause suit tried by a Subordinate Judge under his ordinary jurisdiction—Appeal.*

Where a Subordinate Judge invested with Small Cause jurisdiction tried a small cause suit under his ordinary jurisdiction,

*Held*, that the character of the suit was not altered by the mode in which the Subordinate Judge had exercised his jurisdiction and that his decree being final, was not appealable to the District Court.

APPLICATION under the extraordinary jurisdiction of the High Court.

Plaintiffs brought a suit to recover Rs. 11-4-0 as their share of an annual allowance received by the defendants from the Government treasury.

The Second Class Subordinate Judge of Umreth, who was also invested with the jurisdiction of a Small Cause Court, tried the suit under his ordinary jurisdiction, and awarded the plaintiff's claim.

The defendants thereupon appealed to the District Court, and the First Class Subordinate Judge, A.P., reversed the decree and dismissed the suit.

Against this decision plaintiffs applied to the High Court, contending that the suit being one falling under the Small Cause jurisdiction of the Subordinate Judge, his decree was final: that there was no appeal from it, and that the First Class Subordinate Judge, A.P., had no jurisdiction to reverse it.

*L. A. Shah* for applicants (plaintiffs).

*G. S. Rao* for opponent 1 (defendant 1).

CANDY, J.:—The character of the suit was not altered by the mode in which the Subordinate Judge exercised his jurisdiction,

* Application No. 163 of 1900 under the Extraordinary Jurisdiction.

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The suit was of such a character that no appeal from the Subordinate Judge's decision lay to the District Court. We must therefore make the rule absolute, and set aside the appellate decree of the District Court. No order as to costs.

*Appellate decree set aside.*

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## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

1900.
*December 7.*

MURLIDHAR (ORIGINAL AUCTION-PURCHASER), APPELLANT, *v.* ANANDRAO AND OTHERS (ORIGINAL DEFENDANTS 1 TO 4 AND ORIGINAL PLAINTIFF), RESPONDENTS.*

*Execution—Decree—Sale in execution—Civil Procedure Code (Act XIV of 1882), section 310A and 244 (c)—Order refusing to set aside a sale—Appeal from such order.*

An appeal lies from an order passed under section 310A of the Civil Procedure Code (Act XIV of 1882), refusing to set aside a sale, where the dispute relates to the execution, discharge or satisfaction of a decree and thus comes within section 244 (*c*) of the Code.

SECOND appeal from the decision of R. Knight, District Judge of Sátára, reversing the decision of Ráo Sáheb N. V. Samant, Second Class Subordinate Judge of Rahimatpur.

The question in this appeal was whether an order refusing to set aside a sale under section 310A of the Civil Procedure Code (Act XIV of 1882) was appealable.

On 23rd November, 1893, the plaintiff Nawalram obtained a decree for Rs. 1,247-14-0, together with interest up to the date of recovery, against defendants' father Bhavanrao Anandrao.

On 7th January, 1896, plaintiff applied for execution of the decree and claimed Rs. 1,666-2-0, being the principal amount (Rs. 1,247-14-0) with interest up to date.

A warrant of attachment and sale was issued, but the defendants appeared and paid the amount of the claim and the warrant was returned as satisfied on the 27th August, 1898.

* Second Appeal No. 498 of 1900.

It was subsequently discovered that the Názir had made a mistake as to the amount of interest and that the defendants had paid Rs. 7-1-0 too much. The money however, which was realised in April from the defendants, was paid over to the plaintiff on the 22nd September, 1898, but on that day he applied to the Court stating that in his former application he had undercalculated the amount of interest due to him, and he asked for a fresh warrant for the further amount which he claimed to be due.

Thereupon the Subordinate Judge without giving any notice to the defendants issued a second warrant.

This warrant did not state the full amount to be paid and the interest was left to be calculated at the time of execution.

Two of the payments made by the defendants in satisfaction of this warrant were held not to be in time and a sale in execution was allowed to take place on 15th April, 1899 ; the plaintiff had applied for leave to bid at the sale, but was only allowed to do so in case the biddings reached Rs. 4,000.

At the sale the plaintiff's brother bought the property for Rs. 2.

The defendants subsequently heard of the sale and they at once paid into Court the amount due under the warrant with interest, costs, &c., and they applied under section 310A of the Civil Procedure Code that the sale should be set aside.

The Subordinate Judge refused the application and confirmed the sale.

In appeal the District Judge reversed the decision of the Subordinate Judge and set aside the sale on the grounds : (1) that there had been a mistake on the part of the plaintiff which led to all the subsequent irregularities; (2) that there had been reprehensible carelessness in the Názir's office; (3) that the proceedings had been held by the Subordinate Judge without notice to the defendants ; (4) that an irregular warrant of sale had been issued ; (5) that property, worth certainly not less than Rs. 4,000, had been sold for a sum of two rupees to the plaintiff's own brother ; and (6) that the defendants had all along been ready and willing to pay the amount justly due from them.

He therefore directed that the total debt, including principal, interest and costs, should be computed up to the date of the

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second sale, *viz.* 15th April, 1899; that the plaintiff should recover that amount from the sums paid into Court by the judgment-debtors, allowance being made for what he had already received; that the balance should be restored to the judgment-debtors, and that all the proceedings of the lower Court subsequent to 10th September, 1898, should be set aside.

Against this decision the auction-purchaser preferred a second appeal to the High Court, contending that no appeal lay to the District Judge against an order of the Subordinate Judge made under section 310A of the Civil Procedure Code (XIV of 1882).

*P. M. Mehta* (with *B. A. Bhagwat*) for appellant:—The District Judge had no jurisdiction to hear an appeal from the Subordinate Judge's order in the present case. The order was made under section 310A of the Code of Civil Procedure (Act XIV of 1882). Such an order is not appealable, unless the matter in dispute is one which falls within section 244 (*c*) of the Code, and relates to the execution, discharge or satisfaction of a decree. *Pandurung* v. *Krishnabai*[1]; *Bashir-ud-din* v. *Jhori Singh*[2]; *Hira Lal Ghose* v. *Chundra Kanto Ghose*.[3] In the present case there is no question relating to execution, discharge or satisfaction of a decree. If there was any error, it was merely in the calculation of the amount due under the decree both in the *darkhást* and in the proclamation of sale. Such an error is not one which falls under section 244(*c*) of the Code.

*Robertson* (with *D. A. Khare*) for respondents Nos. 1 to 4:—The dispute between the parties relates to the satisfaction of the decree. The amount due under the decree was miscalculated and misstated both by the decree-holder and by the Názir of the Court. This vitiated the auction-sale. It is a matter essentially relating to the execution, discharge and satisfaction of a decree; and therefore falls under clause (*c*) of section 244 of the Code. If so, the order refusing to set aside the sale under section 310A is appealable.

(1) (1899) P. J. p. 51. (2) (1896) 19 All. 140.
(3) (1899) 26 Cal. 539.

RANADE, J.:—The question of law raised in this case is whether the District Judge had jurisdiction to hear the appeal from the order passed by the Court of first instance under section 310A refusing to set aside the sale. In *Pandurang* v. *Krishnabai*,[1] it was held that in cases where the order under section 310A falls within the section 244 (*c*), an appeal lay to the District Court from the first Court's order. Where the dispute did not fall within the terms of section 244 (*c*), no appeal would lie.—*Prosunno* v. *Kali Das*.[2] Where the dispute relates to the execution, discharge, or satisfaction of a decree, section 244 applies even in cases where the question raised concerns the auction-purchaser.

The Allahabad High Court has held that ordinarily no appeal lies from orders under section 310A except in cases where section 244 applies—*Bashir-ud-din* v. *Jhori Singh*.[3] The Calcutta High Court has also held that an appeal would lie from an order refusing to set aside a sale if under the circumstances section 244 applied—*Hira Lal Ghose* v. *Chundra Kanto Ghose*.[4] The application of the section did not turn upon the question whether the judgment-creditor or the auction-purchaser was the appellant. In a Madras case—*Mammod* v. *Locke*[5]—the same principle appears to have been accepted.

Following these authorities the only question we have to consider is whether section 244 (*c*) applied to the circumstances of this case. The District Judge has set out fully in his judgment the facts of the case, and it appears therefrom that, when the judgment-creditor gave his first "darkhást," he did not claim the full amount. The judgment-debtor satisfied the warrant by paying up more than was demanded. The judgment-creditor then found out his mistake and his application for a second warrant was granted by the Subordinate Judge, without allowing the judgment-debtor any opportunity to see how the account was made up. In the warrant itself the full amount to be paid was not mentioned and the interest additions had to be calculated at the time of the execution of the warrant. The judgment-

(1) (1899) P. J. p. 51.
(2) (1892) 19 I. A. 166; S. C. 19 Cal. 683.
(3) (1896) 19 All. 140.
(4) (1899) 26 Cal. 539.
(5) (1897) 20 Mad. 487.

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debtor paid up the balance of the principal within the time fixed by law. This amount was insufficient and he made up the deficiency by two further payments. These payments were held to be not made within time and the sale was allowed to take place. At this sale the brother of the administrator of the minor judgment-creditor bought the property for two rupees although the creditor himself had undertaken to make a bid of 4,000 rupees for the same property. The circumstances of the case were thus such as to justify the lower Appellate Court in holding that there had been great irregularities in the procedure followed by the Subordinate Judge.

Section 244 (*c*) is intended to govern cases such as these, and the District Judge had full jurisdiction to entertain the appeal. The purchaser was evidently a creature of the judgment-creditor, who only put him forward to escape from his own liabilities and get the property sold for two (2) rupees. We accordingly dismiss the appeal with costs.

*Appeal dismissed.*

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## APPELLATE CRIMINAL.

*Before Mr. Justice Candy, Mr. Justice Ranade and Mr. Justice Whitworth.*

1900.

*December 7.*

QUEEN-EMPRESS *v.* HUSSEIN HAJI.*

*Criminal Procedure Code (Act V of 1898), sections 337 and 494—Withdrawal of prosecution — Discharge — Acquittal — Evidence — Discharged persons called as witnesses—Competent witness—Practice.*

Where the Public Prosecutor with the consent of the Court withdrew from the prosecution of two out of several accused persons tried jointly for an offence under section 4 of the Gambling Act (Bombay Act IV of 1887), and the two accused were thereupon discharged under section 494 of the Criminal Procedure Code (Act V of 1898) and then examined as witnesses for the prosecution,

*Held*, (WHITWORTH, J. dissenting) that the persons so discharged were competent witnesses.

* Criminal Appeal, No. 436 of 1900.

1900.

QUEEN-EMPRESS v. HUSSEIN HAJI.

APPEAL from the conviction and sentence passed by J. S. Slater, Esquire, Chief Presidency Magistrate, Bombay.

The appellant Hussein Haji Abba, along with twenty-four others, was charged before the Chief Presidency Magistrate, under section 4 of Bombay Act IV of 1887, with keeping a common gaming house.

In the course of the trial the Public Prosecutor with the consent of the Court withdrew the charge against two of the accused (Karim and Ibrahim). The Magistrate thereupon discharged them under section 494 of the Criminal Procedure Code (Act V of 1898).

They were then called as witnesses for the prosecution.

The appellant was convicted and was sentenced to pay a fine of Rs. 500 or in default to suffer three months' rigorous imprisonment.

The following passage in the Magistrate's judgment referred to the discharge of Karim and Ibrahim :—

> As regards the position of the witnesses Karim and Ibrahim. They were discharged by me under section 494 of the Criminal Procedure Code. It might have been more in accordance with section 494 if I had acquitted them, but a mere error in making of an interlocutory order of this description comes directly within section 537 (*a*) of the Criminal Procedure Code, and has occasioned no failure of justice or prejudice to the accused. There was an order of discharge against both these accused granted at the request of the Public Prosecutor and in consonance with section 10 of Bombay Act IV of 1887."

The appellant contended *inter alia* that it was irregular and illegal to allow the accused Karim and Ibrahim, who had been discharged under section 494 of the Criminal Procedure Code, to be called and examined as witnesses for the prosecution, and that this irregularity vitiated the whole of the proceedings before the Magistrate.

*H. Sealy* for the appellant.

*Lang* (Advocate General) for the Crown.

CANDY, J.—The main question argued in this appeal is whether the witnesses Karim and Ibrahim were competent witnesses. These men with several others were arrested by the Police in a room said to be a common gaming house. When they and the

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other accused were before the Magistrate on 22nd June last, before any evidence had been led, the Public Prosecutor applied under section 494, Criminal Procedure Code, to withdraw from the prosecution of these two men, and the Magistrate consented. These two men were therefore discharged, and this discharge amounted in law to an acquittal. They were no longer accused, and they could never again be charged with the offence of which they were thus acquitted. They were forthwith examined as witnesses; and it is urged that they were not competent witnesses, and that their evidence could not be taken into consideration against accused No. 2, who was convicted and whose appeal is now before this Court.

The argument thus raised amounts to this, that any person whose prosecution has been withdrawn under section 494, Criminal Procedure Code, can never be examined as a witness, either for the Crown or for the defence, in a case in which he had been an accused. I cannot agree with this contention. The cases quoted by the learned counsel, which had reference to witnesses who had been accused and who had been illegally pardoned, have no application to the present case in which there has been no tender of pardon. Other cases quoted by the learned counsel show that these two men were competent witnesses. Thus in *Reg.* v. *Narayan Sundar*[1] one Bhaskar Sunder was one of the persons apprehended and brought before the Magistrate for trial. He was not even discharged; but he was examined as a witness, and the Court (Couch, C.J. and Newton, J.) held "that the witness Bhaskar Sundar was not at the time he was examined charged with the accused and upon his trial although he had been apprehended, and that he was by law a competent witness." So too in *Reg.* v. *Hanmanta*[2] reference was made to the evidence of several witnesses, to the admission of whose evidence objection had been taken on the ground that they also were persons accused before the Magistrate. But it was held that as these persons had been discharged, although some of them were undoubtedly accomplices, they were not accused persons when they were admitted as witnesses, and therefore their evidence was admissible. In the last case quoted by the learned counsel, *Imp.* v. *Lilladhar*[3]

(1) (1868) 5 Bom. H. C. R. Cr. 1. (2) (1877) 1 Bom. 610, 619.
(3) (1889) Cr. Rul. No. 18.

the reasoning in *Hanmanta's case*, with regard to an *illegally pardoned accused*, not being a competent witness, was extended to the case of an accused person against whom the Magistrate *illegally* allowed the charge to be withdrawn; his subsequent evidence as a witness was held inadmissible. That was a warrant case, in which a pardon could not be tendered under section 337 or in which the complaint could not be allowed to be withdrawn under section 248. The present case was a summons case, no pardon was tendered; the complaint could have been withdrawn under section 248, and as there was a Public Prosecutor, action could be taken under the special provisions of Chapter XXXVIII, section 494. The consent given by the Magistrate cannot now be attacked; and the evidence, whatever may be its weight, was admissible.

It was urged that a comparison with the provisions of sections 337 to 339 show that it could not have been intended by the Legislature that power should be given to the Police to pick and choose which accused person should get scot-free and be turned into a witness, without any risk whether he deposes truly or falsely. The answer to that argument is that the special provision of section 494 can only be brought into force on the application of the Public Prosecutor, when there is one in the case, and with the consent of the Court. The provisions of section 248 are used when the complainant applies for permission to withdraw his complaint and the Court consents. There is nothing to show that the provisions of section 494 or of section 248 can only be applied when there is a single accused person in the case.

Reference was also made by the learned counsel to section 343; but that evidently refers to the examination of the accused under section 342, and moreover it is clear from the record in this case that the evidence of Karim and Ibrahim was not induced by any influence on the part of the Police. These men voluntarily offered their information, and no doubt they were told that the Public Prosecutor would be asked to make application for the prosecution against them to be withdrawn, and if the Court consented to that they would then be examined as witnesses.

The other points urged on behalf of accused appellants do not require lengthy notice. There was no error in law in adjourning

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the case against accused No. 1, who was ill, and proceeding against the rest of the accused. There is nothing to show that the appellant or his pleader made any application to examine as his witnesses those persons who had been summoned on behalf of accused No. 1. There is nothing even now to show that those persons are material witnesses, and that it is necessary for the ends of justice that their evidence should be recorded. As to the appellant's pleader not being permitted by the Magistrate to sum up this case, while the Public Prosecutor was allowed to reply, it is obvious that these facts do not affect the merits of the case. There is no question as to the appellant having been present when the room was raided by the Police. The only question is whether the room was a common gaming house. It is impossible to read the depositions of the two witnesses Karim and Ibrahim, and of the two Police officers, and the statement made on behalf of accused No. 11, without coming to the conclusion that gambling, and not a game of skill, was going on. I would therefore confirm the conviction and sentence.

As my learned colleague is of opinion that Karim and Ibrahim were in effect illegally pardoned, and I cannot agree with that opinion, the case must be laid before a third Judge under section 429 of the Criminal Procedure Code.

WHITWORTH, J.—The principal question in this appeal is whether the men Karim and Ibrahim, who in the first instance were co-accused with the appellant, were, after the cessation of proceedings against them, competent witnesses against him. It cannot be disputed that any accused person who has been properly and judicially discharged or acquitted becomes a competent witness in the case. But in this connection it is necessary to observe also the principle of the law in respect of pardoning an accused person; and by section 337, Criminal Procedure Code, permission to pardon is restricted to cases in which the offence is triable exclusively by the Court of Session. In the present instance the offence is not of that character, but is one under the Gambling Act triable by a Magistrate. It is necessary to see that while in form following one provision of the law, another provision has not in reality been disobeyed. I think it has. It is not contended on behalf of the Crown in

this case that Karim and Ibrahim were discharged merely upon proper judicial considerations, that is upon a consideration of the law and the evidence as affecting them alone. On the contrary, it is frankly avowed that the prosecution against them was withdrawn in order that they might be used as witnesses against other accused persons in the case. In ordinary judicial course, and if their evidence had not been required to be used against others, they would have remained on trial with the others, and the case of all would have been decided at once. (The fact that on account of the illness of one accused person the case was subsequently split into two does not affect the present question.) That is, they would have been co-accused to the end of the proceedings and could not have been examined as witnesses against the others.

That would have been their position if the proceedings had been conducted to the end upon purely judicial considerations, and they have been removed from that position by the Magistrate looking beyond the judicial case as against them and in effect assuming the right of pardon which did not pertain to him in the case. The Magistrate has indeed purported to act not under section 337 but under section 494, Criminal Procedure Code, under which he consented to the withdrawal of the prosecution against Karim and Ibrahim; but the action was essentially the granting of a pardon to the two men or a consent to their being pardoned by the prosecution. It is needless to enquire whether the men first volunteered to give evidence of their own accord or whether the police pressed or advised them to do so. It would be impossible to ascertain exactly how far each party made an advance. But it is certain, and is not disputed, that an understanding was arrived at by which on the one hand they were to give evidence and on the other the prosecution against them was to be withdrawn. That is in effect they were pardoned.

It is necessary to reconcile the provisions of sections 337 and 494, and that can, I think, be done only in the way indicated above, namely, by taking "the consent of the Court" in section 494 as meaning consent based solely upon a judicial consideration of the case against the person from whose prosecution the Public

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Prosecutor desires to withdraw, and not upon any consideration of the uses to which that person may be put in a case other than his own. And indeed, apart from any conflict with section 337, I should think that to be the most natural interpretation of the section.

The case has rested mainly upon the evidence of these two witnesses, and if that be excluded the remaining evidence is, I think, insufficient to establish that the house was being used as a common gaming house. Nor indeed has it been argued that it is so sufficient. I would therefore reverse the conviction and sentence.

There being a difference of opinion between Candy and Whitworth, JJ., the case was referred to a third Judge (Ranade, J.) under section 429 of the Criminal Procedure Code, Act V of 1898, who delivered the following judgment.

RANADE, J.:—The only question of law on which there is a difference of opinion necessitating the reference under section 429 is whether Karim and Ibrahim, who were co-accused with the appellant, were competent witnesses after the Public Prosecutor, with the consent of the Presidency Magistrate, withdrew from the prosecution instituted against them and they were discharged by the Magistrate. The Magistrate's judgment shows clearly that his order should have been not one of discharge but of acquittal. This admitted mistake is one which is covered by section 537, as it did not result in any failure of justice. If the Presidency Magistrate had acquitted Karim and Ibrahim, it is obvious that they would have been competent witnesses against the present appellant. The provisions of section 337 expressly lay down that a person who is directly or indirectly concerned in any offence, and who has received a pardon on his undertaking to give full and true disclosures, is a competent witness. A pardoned accomplice is certainly a less reliable witness than a co-accused in respect of whom the Public Prosecutor, with the consent of the Court, withdraws the prosecution, and who is thereupon acquitted by the Magistrate. The withdrawal of the prosecution in one case, like the acceptance of pardon in the other, restores to the accused his competency as a witness. In the present case though Karim and Ibrahim were apprehended with

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the appellant, the cross-examination of these witnesses shows clearly that from the first they were acting in full sympathy with the instructions of the police, and it was on that account that they were treated with special indulgence, and finally the prosecution was withdrawn against them. The considerations which influenced the Presidency Magistrate to give his consent were judicial considerations such as those referred to in section 337. The distinction made by Whitworth, J., appears not to be borne out by the evidence in this case, and I feel satisfied that the decisions referred in the judgment of Candy, J.—*Reg.* v. *Narayan*[1] and *Reg.* v. *Hanmanta*[2]—fully apply. In one of these cases the accused had been, as in the present case, discharged, yet it was held that the accused were competent witnesses. On the whole I am disposed to agree with Mr. Justice Candy in holding that Karim and Ibrahim were competent witnesses, and that their evidence along with the other police testimony fully justified the conviction and sentence passed by the Magistrate.

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## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

1900.
*December* 12.

RAMDHAN (ORIGINAL DEFENDANT), APPELLANT, *v.* MANIBAI (ORIGINAL PLAINTIFF), RESPONDENT.*

*Will—Construction—Executor—Suit by legatee against executor for arrears of rent—Limitation.*

A Hindu died leaving a son, a daughter, a widow and a brother's widow. He left a will whereby he directed that the two widows should receive "half and half" the annual income realized from the four houses which he specified and that on the death of one of them the survivor should take the whole for her life. The son was to make repairs and to pay the municipal taxes payable in respect of the said houses, but he was to have "no manner of right whatever to the income" thereof. He was also to provide the widows with food and clothing for their life and to provide the expenses of the marriage of the testator's daughter. Except as above mentioned the whole of the testator's property, moveable and immoveable, was left to the son. The plaintiff (one of

* Second Appeal No. 392 of 1900.

(1) (1868) 5 Bom. H. C. R. 1. (2) (1877) 1 Bom. 610, p. 619.

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the widows) sued to recover the rent of the four houses which had accrued since the testator's death. It was contended that by the will the four houses were given to the widows.

*Held*, that the son was the sole owner of the whole property. The will, however, had imposed upon him the duties of an executor and he should be treated as such. There was thus a fiduciary relation established between him and the widows and they were entitled to the arrears of rent for the whole period claimed.

SECOND appeal from the decision of Ráo Bahádur K. B. Marathe, First Class Subordinate Judge, A.P., of Dhulia, confirming the decree of Ráo Sáheb M. V. Kathavate, Second Class Subordinate Judge at Jalgaon.

One Chhoturam died in April, 1893, leaving a son Ramdhan, a daughter Narmada, a widow Bái Mani, and a brother's widow Bái Baktavari.

He left a will which provided *inter alia* as follows:

"I have one son named Ramdhan, and there are my elder brother's widow, who lives joint (with me, *viz.*) Baktavari Bái, widow of Balmukund Set, (my) wife named Mani, and one daughter named Narmadabái, who is a minor. For about three years past I have been ailing. I think that now there is no certainty of my life. Therefore by this will I make a disposition as follows:

(1) As to the moveable and immoveable estate belonging to me which there is in the tálukas of Jalgaon and Bhusaval, in the district of Khándesh and at other places, the same is the self-acquired property, property of both me and my full brother Balmukund Sivlal, who lived joint with me. Balmukund Set died some time back, *i.e.* about four years ago, whilst joint. Since then up to this day I am the sole owner of the whole of the moveable and immoveable estate. Originally there was no ancestral estate; nor is there any (now).

(1) In order that both my brother's widow Baktavari Bái and (my) wife Mani may be independently enabled after my death to practise '*Dharma*' (charity) in accordance with the position of our family and in accordance with their wishes, and in order that there may be no hindrance or obstacle in the way of their (being able to) do so, (I give them) the undermentioned moveable and immoveable property which belongs to me as owner thereof and which is situate at the village of Jalgaon Budruk in Táluka and Sub-district Jalgaon, in the zilla and district of Khándesh. (Here followed the description of four houses owned by the testator.)

Baktavari Bái and my wife Mani should take the above mentioned property independently. As to the rent which may be annually realized from this property, these two ladies should take the same half and half and they should bestow money in 'Dán Dharma' (charity) as mentioned above or they should dispose of it in any manner they like. The said Baktavari Bái and Mani have every right to carry on the *wahivat* of the said property. My son Ramdhan

has no manner of right whatever to the income of the said property. Baktavari Bái and Mani have no right to sell the said property.

(1) Baktavari Bái and Mani, these two ladies, should take the income of the rent of the said property half and half. Should one of the above two ladies die earlier, the survivor should take the whole of the income of the rent of the said property so long as she lives and my son Ramdhan is to make repairs and pay the committee's taxes in respect of all the houses.

(1) For the marriage of my daughter named Narmadabái, my son Ramdhan is to spend Rs. 6,000 (six thousand).

(1) Out of my dwelling *haveli* (house) at Badvat, a suitable portion is to be given to Baktavari Bái for her residence so long as she lives, and a suitable portion of my dwelling *haveli* (house) at Jalgaon is to be given to my wife Mani for her residence so long as she lives.

(1) Besides the income in respect of rent which has been agreed (to be paid) to my sister-in-law Baktavari Bái and my wife Mani for '*Dán Dharma*' (charity, &c.) as mentioned above, my son Ramdhan is to pay to each of them during their (respective) lifetime food and clothing according to their position in life.

(1) Baktavari Bái and (my) wife Mani have a full right to the ownership of the ornaments which are on their (respective) persons and in their (respective) possession and of the cash in their respective possession. They should dispose of the same according to their pleasure. Ramdhan has no right to the ownership of the same.

(1) As to the whole of the moveable and immoveable estate except the above-mentioned moveable and immoveable property, my son Ramdhan is entitled to the same.

After the death of the testator, his son Ramdhan entered into possession of the whole of the estate.

In 1898 the testator's widow Bái Mani brought this suit to recover the arrears of the rent which had been received from the four houses mentioned in the will since the date of the testator's death.

The Court of first instance awarded the claim, and on appeal the decree was confirmed.

Defendant preferred a second appeal to the High Court.

It was contended that under the will the houses had become the property of the widows.

*P. M. Mehta* (with *M. B. Chaubal*) for appellant (defendant).

*Roberstson* (with *M. V. Bhat*) for respondent (plaintiff).

RANADE, J.:—The only point raised before us relates to the

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construction chiefly in regard to that portion of the will which relates to the interest which the ladies Baktavari and Mani could claim under it. It was contended that the four houses were given to the ladies, and not merely a right to receive the income of the same as held by both the lower Courts.

It appears to us that reading the whole will, the testator's intention was to leave the defendant sole owner of the whole property. In regard to the two houses in dispute, the widows had, during the lifetime of both or one of them, only a right to receive the income. They were not to sell the same. Defendant, as the son of the testator, was required to pay the taxes and keep the houses in repair. He was also charged with the duty of providing the expenses of Bái Amba's marriage and he was also charged with the duty of providing maintenance to the widows. These are all functions which belong to the office of executor, and the defendant must thus be treated as executor, especially when he took possession of the whole property and admittedly managed it himself. There was thus a fiduciary relation established between the parties, and the Courts below have correctly held that the arrears of rent were properly awarded not for three years but for the whole period claimed. We dismiss the appeal with costs.

*Appeal dismissed.*

# ORIGINAL CIVIL.

*Before Mr. Justice Batty.*

HEINIGER, PLAINTIFF, *v.* DROZ AND ANOTHER, DEFENDANTS.*

1900.

*September* 29. *October* 1, 8, 9, 11, 12 *and November* 5.

*Trade-mark — Rights of importer of goods bearing manufacturer's or producer's trade-mark—Contract by importer for exclusive supply of goods—False statement in trade-mark—Deception—Evidence—Admissibility of judgment of Foreign Court—Evidence Act (I of 1872), section 32 clause 4, and section 42—Parties—Joinder of parties—Civil Procedure Code (XIV of 1882), sections 27, 31, 32 and 34—Practice.*

The plaintiff, an importer and seller of watches, sued to restrain the defendants from importing into or selling in Bombay or other parts of India watches similar in appearance to a certain class of watches imported and sold by the plaintiff and having a trade-mark so similar to the trade-mark on the watches imported by plaintiff that it was calculated to deceive purchasers into the belief that such watches were watches imported and sold by the plaintiff. It was proved that the trade-mark on the watches so imported by the plaintiff was not the trade-mark of the plaintiff but that of the manufacturer in Switzerland, and that the plaintiff was merely an importer and seller of the watches under a contract for exclusive supply in India.

*Held*, that the plaintiff was not entitled to an injunction. An importer can only protect a trade-mark representing his own reputation and the advantage accruing therefrom, but not the trade-mark of another, a manufacturer or producer. It was necessary for the plaintiff to show that the value of the trade which he carried on was due to the reputation acquired by and attaching to the trade-mark as a guarantee of importation by him and not merely as a guarantee of manufacture by somebody else and that therefore the imitation of that trade-mark was an infringment of an exclusive right of his own entitling him to ask for protection. This the plaintiff has failed to do.

It was contended by the defendants that in no case was the plaintiff entitled to relief, inasmuch as by using the words "Roskopf Patent" in the trade-mark for which he claimed protection he was guilty of deception, the fact being that there was no patent in existence for the watches which bore this trade-mark. A certified copy of the judgment of a Swiss Court against one Ferdinand Schmidt on this point was tendered in evidence.

*Held*, that the issue as to the use of the word 'Patent' could not be decided in this case if the trade-mark in question was not the plaintiff's, as the Court could not in this suit decide whether Messrs. Schmidt and Company were or were not precluded from using the word 'Patent' on Roskopf watches manufactured by

* Suit 113 of 1900.

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them. No decision on the point could have effect in a case to which Messrs. Schmidt had not been made a party.

*Held*, also, that the judgment tendered was not admissible in evidence.

An application was made on behalf of the plaintiff to add the manufacturer as co-plaintiff in the suit.

*Held*, that the application should be refused. The plaintiff's case was wholly different from that of the manufacturer. The plaintiff's case was that the defendants had infringed his trade-mark as importer, the exclusive right to which in India had been established. The manufacturer's claim would raise questions as to his rights to adopt and protect it in the country of its origin and consequently in all possible markets in which it might be introduced. Sections 27, 31 and 32 of the Civil Procedure Code did not apply.

THE plaintiff prayed for an injunction restraining the defendants from importing into or selling in Bombay or other parts of India a certain class of watches.

The plaintiff was a watchmaker, doing business in Bombay, and he alleged that he had for many years been importing and selling in Bombay and elsewhere in India watches of a particular description of two sizes known as the Roskopf Patent Watches, which were manufactured at Chaux de Fonds in Switzerland by a firm carrying on business in the name of "Widow of Charles Leon Schmidt," the name "Roskopf," inside a circle with a white star of five points in the centre enclosed in an irregular white line, being the registered trade-mark of that firm in Switzerland.

The plaint stated that the watches imported by the plaintiff bore the words "Roskopf Patent" inside a circle with a white star of five points in the centre enclosed in an irregular white line on their face and had the said trade-mark also stamped on the back of the case, and that the plaintiff's said watches were well known and much inquired for and purchased in India, particularly by natives, under the name of "Roskopf" watches, and that the plaintiff had acquired a reputation and made considerable profit by the sale thereof: that in October, 1899, the plaintiff learned that the defendants had imported into Bombay a consignment of watches of two sizes, very similar in size, shape and general appearance to the plaintiff's said watches and having the word "Horoscope" in a circle with a design in the centre not unlike a star in the same position as the word "Roskopf" appeared on the plaintiff's watches,

The plaintiff alleged that the pronunciation of the words "Roskopf" and "Horoscope" by non-English speaking persons was so much alike as to mislead a purchaser, and he charged that the defendants had imported the "Horoscope" watches with the object that persons might be deceived into the belief that they were buying the plaintiff's Roskopf watches, and that the use of the name "Horoscope," especially when taken in conjunction with the said circle and design on the face thereof and the size, shape and appearance of the said watches, would cause the same to be sold as the plaintiff's Roskopf watches.

The plaint further stated that the watches imported by the defendants had been manufactured by one C. Meyer Gräber of Chaux de Fonds in Switzerland, and that the plaintiff's manufacturer had taken legal proceedings against him in Switzerland, whereupon C. Meyer Gräber had given a written undertaking to have the word "Horoscope" cancelled and not to use it any more or to make use in future of any trade-mark similar to that of the plaintiff.

It was further stated that after the arrival of the defendants' consignment of watches in Bombay the plaintiff remonstrated with the first defendant and objected to the sale thereof as being an infringement of his trade-mark and required the first defendant to re-ship the watches to Switzerland, but the first defendant, while admitting that the watches appeared to be an imitation of the plaintiff's watches and an infringement of his trade-mark and calculated to deceive purchasers, expressed his inability to re-ship the watches to Europe as the consignment was a large one.

The plaint prayed for a perpetual injunction against the defendants, for an account and for delivery up of the defendants' consignment to be destroyed.

It appeared from the evidence given at the hearing that the trade-mark on the watches imported by the plaintiff was not his trade-mark, but was the trade-mark of Messrs. Schmidt and Co. the exporters, and that the plaintiff imported and sold these watches under a contract for exclusive supply in India.

The defendants in their written statement traversed all the allegations in the plaint.

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At the hearing the defendants raised the following issues:—

(1) Whether the plaintiff has such an interest in the trade-mark as to entitle him to maintain this suit.

(2) Whether the defendants by the importation of Horoscope watches, mentioned in the plaint, have infringed any trade-mark belonging to the plaintiff.

(3) Whether the defendants by the importation of the said Horoscope watches have attempted to pass or passed off the said watches as the Roskopf watches imported by the plaintiff.

(4) Whether the plaintiff is entitled to the relief claimed or any part thereof.

(5) Whether the plaintiff by using the word "Patent" has not been guilty of deception, and whether he is not therefore disentitled to relief in this suit.

In the course of the hearing of the case the following words were allowed to be added to the fifth issue:

"And are the defendants entitled at this stage to take this objection, not raised in the written statement, without notice."

*Raikes* (with *Scott*) for defendants.

The first objection to the plaintiff's case is that the watches for which he asks protection bear a false inscription. They are called "Roskopf Patent." But the evidence shows that there is no patent in existence for these watches. Where a false statement of this kind is made the Court will not grant an injunction. Sebastian's Law of Trade-Marks (4th Edition), page 213 *et seq.*, *Morgan* v. *McAdam*;[1] *Flavel* v. *Harrison*[2]; *Ford* v. *Foster*[3]; *Leather Cloth Company* v. *American Leather Cloth Company*.[4] Next we say the plaintiff has not such an interest in this trade-mark as to entitle him to bring this suit. It does not belong to him. It belongs to Messrs. Schmidt and Company. The plaintiff is merely an importer of these watches: *Richards* v. *Butcher*.[5] Messrs. Schmidt might sue, but they have not done so, and they are not parties to this suit. The fact that the plaintiff is the exclusive importer of these watches under a contract with Schmidt and Company does not give him a right to sue. No amendment can now be made. *Bhanu* v. *Kashinath*[6]; *Sayad Abdul Hak* v. *Gulam Jilani*[7]; *Ayscough* v. *Bullar*.[8]

(1) (1866) 36 L. J. (Ch.) 228.
(2) (1853) 10 Hare. 467.
(3) (1872) L. R. 7 Ch. 611.
(4) (1865) 11 H. L. C. 523.
(5) (1891) 2 Ch. 522.
(6) (1895) 20 Bom. 537.
(7) (1895) 20 Bom. 677.
(8) (1889) 41 Ch. D. 341.

Next, on the merits, no infringement of the trade-mark has been shown.

*Robertson* (with *Lang*, Advocate General) for plaintiff.

The objection to the use of the word "Patent" is one of which we have had no notice. It ought to have been taken in the written statement. It is too late to take it now. So also the objection that the plaintiff is not the proper person to bring this suit has now been made for the first time. That objection also should have been taken in the written statement—Civil Procedure Code (XIV of 1882), section 34. On the general question they cited *Ralli* v. *Fleming*[1]; *Apollinaris Company* v. *Norrish*[2]; *Richards* v. *Butcher*[3]; *Radde* v. *Norman*.[4]

BATTY, J.:—This case was concluded on Friday the 12th October, a little before the time the Court ordinarily rises. It was understood that there would not be time before my vacating office,—my tenure expiring on the next day, Saturday the 13th—to consider the evidence and write and deliver judgment. Counsel for both sides agreed, thereupon, to accept judgment though written and delivered after the expiry of office as if written and delivered before. It was also understood that judgment should be accepted if delivered by my successor in office. The case was contested strenuously and with distinguished ability on both sides, and the points involved requiring careful consideration, there was no alternative to the course agreed to.

In this case the plaintiff, Charles Heiniger, seeks a perpetual injunction to restrain defendants, Constant Droz and Amotritz, their servants and agents, from importing or selling in Bombay or other parts of India any watches similar in appearance to the watch "Horoscope" or having on their faces a circle with the word "Horoscope" therein and with the design at present appearing on watches sold under that name, or having any design or mark whatsoever which may be calculated to deceive purchasers into the belief that such watches are the watches of the plaintiff. A prayer is added for account and for the delivery

(1) (1878) 3 Cal. 417.
(2) (1875) 33 L. T. (N. S.) 242.
(3) (1891) 2 Ch. 522.
(4) (1872) L. R. 14 Eq. 348.

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for destruction of such watches as the defendant has imported of the description complained of.

The plaint sets forth that the plaintiff, as watchmaker and jeweller, has for years past imported watches made by the firm of C. L. Schmidt and Co. of Chaux de Fonds in Switzerland, and known as "Roskopf Patent" watches, the trade-mark appearing thereon as duly registered in Switzerland being further described; and alleges that those watches having acquired a local reputation, the defendants have, with intent to deceive the public or purchasers, imported the watches known as "Horoscope" bearing a design similar to that of the "Roskopf" trade-mark, in consequence of which steps were taken not only to stop the defendants' consignment in the Customs House, but to proceed criminally against the defendants under section 486 of the Indian Penal Code and section 7 of the Merchandise Marks Act, 1889. The plaintiff further alleges that the manufacturer of the Roskopf watches in Switzerland took proceedings against Messrs. Gräber, the manufacturer of the Horoscope watches in the same country, with the ultimate result that Messrs. Gräber undertook to cancel the trade-mark "Horoscope," and to make no further use of any trade-mark similar to that of the plaintiff. The plaintiff also averred in the plaint that he believed the defendant to have been aware that another importer of Horoscope watches, Phiroz Punthaky by name, had consented to re-ship, on plaintiff's remonstrances and threats of proceedings, a consignment of Horoscope watches on the arrival thereof in Bombay. The plaint contains a further statement that the first defendant admitted the apparent imitation of the Roskopf watches in the Horoscope consignment, but declined to re-ship as that consignment was a large one. These allegations appear to be the most material of those contained in the plaint for the purposes of the decision of this case.

The defendants in their written statement deny all knowledge of the reputation and profit alleged to attach to the Roskopf watches, and also deny that any deceptive similarity exists between the Horoscope watches imported by them and the plaintiff's Roskopf watches and trade-mark, beyond such inevitable resemblance as is common to all cheap Swiss-made

watches, and they assert that there has been no infringement of the Roskopf trade-mark, and that the Magistrate in the criminal proceedings referred to so decided in dismissing the complaint. The defendants also denied all knowledge of the alleged negotiations between the firms of Schmidt and Gräber, the manufacturers respectively of the Roskopf and Horoscope watches, and of the alleged undertaking by Messrs. Gräber, and they disputed the relevancy of the allegations in the plaint on this matter. The first defendant further denied all knowledge of the facts alleged in the plaint as to the stoppage of the consignment to Phiroz Punthaky. He also denied that he had ever admitted the Horoscope watches to be an imitation of the Roskopf watch or to be an infringement of plaintiff's trade-mark.

The defendants' counsel, Mr. Scott, raised the following issues:—

1. Whether the plaintiff has such an interest in the trade-mark as to entitle him to maintain his suit?

2. Whether the defendants by the importation of Horoscope watches, mentioned in the plaint, have infringed any trade-mark belonging to the plaintiff?

3. Whether the defendants, by the importation of the said Horoscope watches, have attempted to pass, or passed off, the said watches as the Roskopf watches imported by the plaintiff?

4. Whether the plaintiff is entitled to the relief claimed or any part thereof?

5. Whether the plaintiff by using the word "Patent" has not been guilty of deception, and whether he is not therefore disentitled to relief in this suit?

The learned Advocate General, who appeared for the plaintiff at the first hearing, objected to this issue as not raised by the written statement which was filed on 22nd February; and that, had the point been raised, the necessary evidence could have been obtained from Europe on the point.

Mr. Scott for the defendants referred to section 147 of the Code of Civil Procedure, 1882, which contemplates the framing of issues on allegations on oath made by the parties or by persons present on their behalf or on allegations made by the pleaders.

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No adjournment, he contended, was necessary, but if necessary, an adjournment could be made. "Roskopf" he alleged to be a system, not a "Patent."

The Advocate General objected that the question involved would be one of Swiss law and that an adjournment would be necessary: that the use of the word "Patent" was justifiable and was recognized as it formed part of the registered trade-mark in Switzerland.

The issue was then allowed to stand with this addition: "And are the defendants entitled at this stage to take, without notice, this objection not raised in the written statement?"

The case was then proceeded with on 29th September, 1st, 8th, 9th, 11th and 12th October. The plaintiff and three other witnesses on his behalf, and the defendant No. 2 and two other witnesses on behalf of the defendants being examined, and forty-two exhibits for plaintiff and twenty-three for defendants being put in evidence.

The first and fifth issues are manifestly preliminary points as to the right of the plaintiff to sue, and it will therefore be convenient to consider them instead of proceeding to the examination of the general evidence and the exhibits.

Now with regard to the use of the word "Patent" on the Roskopf watches, it is obvious that the issue on that point cannot be decided in this case if the trade-mark in question is not the trade-mark of the plaintiff, as this Court could not in the suit, as at present constituted, decide as to whether Messrs. Wille Schmidt & Co. of Chaux de Fonds, Switzerland, were or were not precluded from making use of the word "Patent" in relation to the Roskopf watches manufactured by them. If the trade-mark in its entirety belongs to Messrs. Schmidt & Co., the plaintiff could claim no right to protect it from infringement whether it did or did not contain any element of deception, and no decision as to the right of Schmidt & Co. to use the phrase "Patent" could have any effect in a case to which that firm had not been made a party.

Mr. Scott, on behalf of the defendants, indeed tendered a document which purported to be a certified copy of a judgment by a Swiss Court against one Ferdinand Schmidt on the point in question, and at first attempted to justify its admissibility

under section 32 (4) of the Indian Evidence Act, 1872, as an opinion as to a matter of public or general interest. That clause, however, would manifestly be inapplicable to a document purporting to deal with the rights of a private individual as against the public, in which the interests of the individual formed the subject-matter of the statement; nor is it possible to say that the statement of opinion in the judgment could, within the meaning of the concluding words of that clause, be regarded as made before any controversy as to such matter had arisen. For similar reasons section 42 of the Evidence Act appeared equally inappropriate. And as the defendant in the case referred to is not alleged to have any privity with the present plaintiff, the admissibility of the document in question did not appear to have been made out.

The difficulty that arose in connection with this point illustrates, however, the grave importance in such a case as the present, of the question whether the plaintiff is either responsible for, or entitled to protect, the trade-mark on the watches which he imports or sells.

The plaintiff alleges in his cross-examination that he believed the words "Roskopf Patent" in the trade-mark mean that a certain part of the watch is patented; that he had nothing to show that; but that it is patented in Berne, in Switzerland, he believes. It is evident that the plaintiff is not, and, at all events at present, could not be expected to be, in possession of the full information and documents that would be requisite to justify the use of the word "Patent" in the trade-mark, and if it be a question between the defendants and the present plaintiff whether the latter is disentitled, by the use of the word, to bring the suit, it may well be that the omission from the written statement of all reference to the objection now taken, and the absence of admissible evidence on their part to support in any way their contention, might, in the circumstances of the case, absolve the plaintiff from the necessity of meeting an unsupported allegation of fact which is not admitted by him, and which he has had insufficient notice that he would be called on to meet unless and until the plaintiff has established his right to the trade-mark. However, it is unnecessary to

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consider the effect of the cases cited by Mr. Raikes—*Singer Manufacturing Co.* v. *Wilson*,(1) *Morgan* v. *M'Adam*,(2) *Marshall* v. *Ross*,(3) *Sykes* v. *Sykes*,(4) *Flavel* v. *Harrison*,(5) *Ford* v. *Foster*(6)—on behalf of the defendants for the purpose of questioning the propriety of the word "Patent" in connection with the watch in question, or to discuss the possibility that the word "Patent" may have been used only as part of a well-known designation rather than as a representation that the watch is protected by an existing patent.

The point of primary importance for the plaintiff's case is that he should show that the value of the trade which he carries on is due to the reputation acquired by, and attaching to, the trade-mark as a guarantee of importation *by him*, and not merely as a guarantee of *manufacture by somebody else*, and that therefore the imitation of that trade-mark is an infringement of an exclusive right of his own, entitling him to ask for protection in this country. The evidence on this point consists of plaintiff's own statements of certain entries in his books, of the certificate of registration of the trade-mark, and of the evidence of defendants' witness (No. 2) Hajee Mahomed and the invoice (Ex. 21) of importation by him.

And, first, it must be noted that the plaint alleges only that the plaintiff has for years past imported the watches in question, alleging no further ground of title to the trade-mark.

In examination-in-chief the plaintiff stated:

"I have been carrying on business for ten years in Bombay, during which I have been importing watches called Roskopf into Bombay. I have been the sole importer for the last eight years . . . They have always had on their faces, backs, and inside, the same design, as long as I have been importing them . . . . . The defendant had six samples in his office of the Horoscope watch . . . . Mr. Droz (defendant 1) admitted they (the watches imported by him) were an imitation, but said that I should have stopped the registration of the word 'Horoscope' in Switzerland."

And in cross-examination by Mr. Scott, plaintiff stated:

"These watches are made at Chaux de Fonds in Switzerland . . . . . My principals are Venve Schmidt & Co. and Wille Brothers . . . I am not paid by

(1) (1876) 2 Ch. D. 434, 456.
(2) (1866) 36 L. J. Ch. 228.
(3) (1869) L. R. 8 Eq. 651.
(4) (1824) 3 B. & Cr. 541.
(5) (1853) 10 Hare. 467.
(6) (1872) L. R. 7 Ch. 611.

my principals. The watches are not sent on commission sale. I get no bonus on the sale of the watches. I make my profit. They are sent to me on credit. I got my last consignment of Roskopf watches last month from Wille Schmidt & Co. The two firms combined many years ago. For the sale of the watches they are combined; not for the manufacture. I have no written agreement with Wille Schmidt & Co. My business with them commenced in 1894-95. The terms were arranged by personal interview. There is no written record of the terms . . . I say a star in concentric circle is the property of my firm, *that is to say of Wille Schmidt & Co.*"

The above statements, it is to be noted, were all made before the two o'clock recess on 29th September—the day the issues were framed. The plaintiff had, then, been asked to produce his books, and did so at 3 P. M., and the book (Ex. 11) was then put in. On page 188 of that book appears the following entry—

"1900. June 30. Remispart desfrais de proces Framrose and West End Co. fr: 459.60
Agio fr: 100

—as a debit against the Swiss firm, and plaintiff being questioned said:

"I take credit in the first two entries on page 188 in respect of money paid in respect of proceedings taken between me and Framroz and West End Company. I still say the watches are my property and not the property of the Swiss firm. I am the out-and-out purchaser of those watches, and I expect I am the sole purchaser, or ought to be, in Bombay of those watches. I say 'ought to be,' because *I am the sole agent for these watches.* I have an agreement with Wille Schmidt not to sell (*i. e.*, that Wille Schmidt should not sell) those watches to any one else in Bombay, but it is not in writing. I take credit for these payments on account of Framroz &c., *because the trade-mark belongs to them* (*i. e.* Wille Schmidt & Co.), and I thought it only right they should pay. *I took the credits with their consent.*"

Then in re-examination, Exhibit H was put in for plaintiff, though objected to on behalf of the defendants as irrelevant. Exhibit H purports to be an original certificate of registration of the identical trade-mark as found on the Roskopf watches (Exhibits A and B). It is dated 28 Fevrier, 1887, and certifies Ch. Leon Schmidt & Co. domiciled in Chaux de Fonds Canton, Neuchatel, to have submitted the appended mark of which they declare themselves to be the legal proprietors *(proprietaires legitimes)*.

Then follows the signature of Schmidt & Co., and a printed note to the effect that when the declaration is made by a proxy of

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the person submitting the mark, the address of the latter must be added to the signature, and, moreover, the power-of-attorney of the owner of the mark must accompany the documents. Mr. Scott was allowed to put further questions on Exhibit H, and elicited from the plaintiff that this trade-mark, registered in 1887, had formed the subject of an action in Switzerland to which Messrs. Wille Schmidt were parties and that the trade-mark had not been since altered in Switzerland to his knowledge.

From the admissions of the plaintiff, the entries in Exhibit 11 and the certificate Exhibit H, it is thus perfectly clear that the trade-mark on the Roskopf watches is the trade-mark of Wille Schmidt & Co., the exporters, and the plaintiff's connection with the watches was only that of an importer and seller under a contract for exclusive supply in India. Plaintiff asserts that he is the owner of the watches which are consigned to him; but this might be alleged by any other purchaser of those watches. But neither the plaintiff nor his counsel for him has been able to claim any property in the trade-mark. It may be noted that the plaintiff's witnesses, Nusserwanji Kanny, and Mr. Lund of the well-known firm of Lund and Blockley, both admitted that the Roskopf watches had been imported into and sold in Bombay for years before the present plaintiff began to import and sell them, and Mahomed Ali, witness for plaintiff, gives the names of successive agents for those watches, and says that *they sold with the same trade-mark*. Lastly, Haji Mahomed Haji Umed, witness No. 2 for defendants, proved that he imported Roskopf watches of the genuine mark, which the plaintiff does not dispute, from London through an English agent.

Mr. Robertson has been unable to contend that his client has taken, or could take, any steps to prevent such importation by others of the genuine Roskopf manufactured by Wille Schmidt otherwise than through the medium of Messrs. Wille Schmidt themselves, that is by enforcing as against that firm the contract for exclusive supply in India.

The case on which Mr. Raikes relies for the defendants is that of *Richards* v. *Butcher*,[1] before Kay, J., in which Sir Horace

[1] (1890) 62 L. T. (N. S.) 867.

(now Lord) Davey and Renshaw, Q.C., appeared for the plaintiffs, and Aston, Q.C., with Cutter appeared for the defendants. Plaintiffs were champagne importers, and sued to restrain another firm from selling champagne under the term "Monobrut" or any other word in colourable imitation of certain trade-marks consisting of the words "Monopole" and "Dry Monopole," of which Messrs. Heidsieck & Co., champagne exporters at Reims, were the proprietors. Heidsieck & Co. had sent a letter to a member of plaintiffs' firm in the following terms:

"As the firm of Theodor Saton & Co., of which you are a partner, is to be dissolved on 30th June next, we hereby agree to transfer into your hands the sole agency for sale of our champagne wines in the United Kingdom of Great Britain and Ireland, also in the British Colonies, on and after the 30th June next. We promise to sell none of our wines to any person residing in the United Kingdom, or its Colonies, but exclusively to your firm which is to be styled 'Samuel Richards & Co., sole agents for Heidsieck & Co.'s Dry Monopole.' Any order which we may receive direct from the said quarters shall be transmitted by us to your firm, and the orders which we receive from you shall be invoiced to your account and risk at the same prices which we actually charge to the firm of Theodor Saton & Co."

The statement of claim alleged that Heidsieck & Co. were the registered proprietors of two trade-marks consisting of words "Monopole" and "Dry Monopole." The case came before the Court to be argued on the point of law, that the plaintiffs were not capable of suing, inasmuch as they were not the proprietors of the trade-marks, being merely in the position of purchasers of Heidsieck & Co.'s wines under the agreement. The proceedings were in the nature of a demurrer to the statement of claim. Of the cases cited the following only are available here for reference,—namely, for defendants, *Heap* v. *Hartley*,(1) *Adams* v. *North British Railway Company*(2); and for plaintiff, *Ihlee* v. *Henshaw*,(3) *Radde* v. *Norman*,(4) *Apollinaris Company* v. *Norrish*,(5) *Goodfellow* v. *Prince*.

The Court observed:

"The plaintiffs have misconceived their rights entirely. They are persons who have established the right to what they call an agency from Messrs.

(1) (1889) 42 Ch. D. 461.
(2) (1873) 29 L. T. 367.
(3) (1886) 31 Ch. D. 323.
(4) (1872) L. R. 14 Eq. 348.
(5) (1875) 33 L. T. 242.
(6) (1887) 35 Ch. D. 9.

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Heidsieck & Co. the producers of the well-known champagne, and they say, 'We have a right to prevent any one else selling champagne which is not Heidsieck & Co.'s under a name which is the same or substantially the same as that adopted by Heidsieck & Co.' The plaintiffs put their case in this way. They say, 'We have bought from Heidsieck & Co., under an agreement with them, the exclusive right to sell their champagne in this country and the Colonies, and therefore we shall be damnified if any one else sells champagne in bottles with Heidsieck & Co.'s trade-mark on them.' The plaintiffs do not allege that these trade-marks, or either of them, mean wine sent by Heidsieck to this country to be sold by the plaintiffs exclusively, and that is not the meaning of the trade-marks. I asked the plaintiffs' counsel in what respect their position differs from that of any other purchaser of Heidsieck & Co.'s wine. The answer given was that they have the *exclusive right of sale*. But Heidsieck & Co. only contracted that they would not sell their wine to any one except Richards. If by any means whatever any person in England got Heidsieck's wine, whether he bought it in France, or in Germany, or in England of the plaintiffs, or of any one else, he could not be prevented from selling it: he has a perfect right to do so; it is an article of commerce in which he has a perfect right to deal. The plaintiff's counsel admitted that every purchaser of Heidsieck & Co.'s wine could not maintain an action for such an injunction as is now sought: but it was said that the plaintiffs have, by their bargain with Heidsieck & Co., an exclusive right. But *that only means that Heidsieck & Co. have bargained with the plaintiffs* not to sell wine to any one in this country but them. How can that give the plaintiffs a greater right to sell than any one else? Every other purchaser from Heidsieck & Co. have just as much right to sell as the plaintiffs have. Therefore *the utmost that the bargain gives the plaintiffs is the right to bring an action against Heidsieck & Co. if that firm consigns their wine for sale in this country*. How does that give the plaintiff a right to prevent an infringement of Heidsieck & Co.'s trade-mark or to prevent some one from committing a fraud by selling as Heidsieck & Co.'s wine which is not theirs? In my opinion no such right is given, or intended to be given, to the plaintiffs by the agreement. *There was no assignment of, or agreement to assign the trade-marks* 'Monopole' and 'Dry Monopole.' In fact the agreement does not mention those trade-marks or even speak of them at all, except in an incidental way when it speaks of 'Heidsieck & Co.'s Dry Monopole.' Accordingly I am of opinion that *the agreement does not give the plaintiffs any interest in Heidsieck & Co.'s* trade-marks other than, or greater than, or different in any way from that which any purchaser of Heidsick & Co.'s champagne has. A purchaser of Heidsieck & Co.'s champagne could not bring an action for infringement of their trade-marks or for fraud in selling as Heidsieck & Co.'s wine that which is not their champagne. How, then, can the plaintiffs be in any better position? Their case is entirely misconceived. In my opinion they have no right to bring an action of this kind, they have *no interest in the trade-marks*, they have no right to restrain a fraudulent use of them, and therefore I must decide this point of law against them with

costs, but I will give them leave to amend their action by making the present owners of the trade-marks plaintiffs."

Of the authorities in that case cited for the defendants, *Heap* v. *Hartley*(1) shows that even an exclusive license, unless coupled with a grant, can give the licensee no title to sue in his own name. "It is," said Fry, L.J., "a license to do a thing and a contract not to give leave to anybody else to do the same thing. But it confers, like any other license, no interest or property in the thing." The case of *Adams* v. *The North British Railway Co.*(2) was also cited for the defendants in *Richards* v. *Butcher*, and was a case in which the patentees and proprietors of a certain invention had constituted one Burlock their general agent to introduce and sell the invention in Great Britain and to grant licenses for the use of the same. And Burlock agreed to give the plaintiff the sole agency and control of the working of the patent in Great Britain and a general power-of-attorney to act, with a percentage of royalties and profits, plaintiff agreeing to push and work the patent vigorously and to manage the manufacture. Lord Selborne, without hearing the defendants, observed that Burlock had no authority to assign the patent, and added: "The bill states merely that he was a general agent to sell the invention and grant licenses, and I am of opinion that those words give only a general power to work the patent in this country..... It cannot be said that it gives a right to *assign* the patent..... The clause constituting Burlock an 'agent' does not speak of any interest in the *patent*..... This is a patentee's bill, and it is filed by a man whose only right is against his own principals." This case was apparently taken as showing that a power to sell and grant licenses for the use of an invention, does not amount to an assignment of the patent itself, so as to give a right "to ask either for damages for an infringement or an injunction to restrain infringement in future."

The case of *Ihlee* v. *Henshaw*,(3) cited for the plaintiff in *Richards* v. *Butcher*, shows that where there has been an assignment of a registered trade-mark the assignee can bring an action to prevent the use of the trade-mark without having registered

(1) (1889) 42 Ch. D. 461. (2) (1873) 29 L. T. 367.

(3) (1886) 31 Ch. D. 323.

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the assignment. But that case was evidently treated as irrelevant in *Richards* v. *Butcher*, on the ground that a mere agreement to supply exclusively is not an assignment of the trade-mark.

The case of *Radde* v. *Norman*,[1] also quoted for plaintiffs in *Richards* v. *Butcher*, seems at first blush to come much nearer than the others cited to the case of *Richards* v. *Butcher* and to the present case. For in *Radde* v. *Norman* the plaintiffs claimed an exclusive right to import kainit under a grant from the Ducal Government of Anhalt. But the distinguishing circumstances in that case were not only that the plaintiffs had an exclusive right of *export* from certain mines so that they had an exclusive right to all kainit from the particular locality of Leopoldshall, but also that they adopted the distinctive name of "Leopoldshall" for the kainit supplied by them. Thus, as appears from the arguments, the issues were, first, whether the word "Leopoldshall" was a trade-mark? and second, have the plaintiffs the exclusive or sole right of selling their kainit in this country? Wickens, V.C., therefore said: "The plaintiffs seem to have established a *prima facie* case to treat 'Leopoldshall' as denoting in the English market the unadulterated article imported by Mr. Radde," and further, "I must treat the case as one in which the plaintiffs have established *prima facie* what I admit to be a very difficult title to establish, a title to the exclusive use of a particular word *as a trade-mark*," though he added that he by no means decided that it would be sufficiently established as against a person who, in ignorance of any claim upon Radde's part, had sold, or offered for sale, raw Leopoldshall kainit, which he had lawfully got into his possession with good reason to believe that it was what he described. In this decision reference was made to the fact that defendants had not attempted to show, or at any rate had not shown, any excuse for using a colourable imitation of plaintiff's trade-mark. The case seems to indicate that the mere exclusive right to sell, within a limited area, would give no right to restrain a person importing and selling the same article within that area, but that where the importer has adopted a trade-mark as a guarantee of importation by him from a specified spot, he is entitled to protection against a person using that mark and

[1] (1872) L. R. 14. Eq. 348.

altogether unable to show importation from such spot. The case is therefore in some respects akin to that of the *Apollinaris Company* v. *Norrish*,(1) which is relied on by the plaintiff in the present case. It was also relied upon for the plaintiffs in *Richards* v. *Butcher*, and it is noteworthy that the present Lord Davey appeared for plaintiffs in the *Apollinaris Company* v. *Norrish* as well as in *Richards* v. *Butcher*.

The counsel for the plaintiff in this case rely on the case of *Apollinaris Company* v. *Norrish*, because that was a case in which the plaintiffs had an exclusive right to sell in Great Britain and the Colonies the imported natural water during the existence of their contract with the owners and exporters thereof. The defendants had made an artificial mineral-water, being the chemical equivalent of the natural-water, and they sold it under the name and designation of "London Apollinaris Water, possessing all the properties of the natural water." The head-note to the report of the case, in speaking of plaintiffs' agreement as a *grant*, is apparently misleading. They had, like the plaintiff in the present case, a mere contract for exclusive supply. If the Apollinaris Company had had nothing but that contract to rely upon, then the case would, no doubt, have been on all fours with the present case, and the decision therein would be inconsistent with the decision in *Richards* v. *Butcher*. But the remarkable point is that the question was never raised in that case whether plaintiffs' interest as a mere consignee for sale, with a contract for exclusive supply, was an interest sufficient to enable them to restrain the defendants. If that point could have been taken, it is difficult to suppose that it would have been overlooked, nor is it probable that if the case were an authority on the point or had touched upon it at all, it would, though cited in argument, have been passed over without comment in *Richards* v. *Butcher*. But it is to be noted that the counsel for the defendant Norrish did not raise that question. He argued that whether plaintiffs had a monopoly or not of Apollinaris water, they had no right to constitute an old word a *trade-mark*; that in all cases where an injunction had been granted the plaintiffs had been the first

(1) (1875) 33 L. T. 242.

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introducers of the name and it had acquired celebrity in the market under that new name, and that this was an attempt to set up a monopoly, that is to say by means of a trade-mark. But on turning to the arguments for plaintiffs, the Apollinaris Company, it appears what the real point at issue was. Those arguments rested on the fact, *not* that the Company had "under their contract the sole right of importing and selling the genuine Apollinaris water in England," but that having that right "they had acquired a property in the word 'Apollinaris,' which is a fancy name, and their adoption and application of it to an article in the market *give them the exclusive right to use it.*" In other words it was their trade-mark, and it was as their trade-mark a guarantee and an embodiment of their reputation for the importation of the water by them. It meant that they were the importers, and whatever value it had was due to their reputation as importers. It was thus distinguishable and indeed utterly different from Heidsieck's trade-marks in the case of *Richard* v. *Butcher*, which did *not* mean wine sent by Heidsieck to be sold by the plaintiffs exclusively, and thus in no way represented the celebrity of the plaintiffs as importers. And therefore Bacon, V.C., in the *Apollinaris Company's* case, after dealing briefly with the question whether the trade-mark was bad as setting up a monopoly, and disposing of it on the ground that "the owner of a spring has the right to sell his water just as he thinks fit," *i.e.* by any name he chooses, said [1]: "They (the plaintiffs) have the exclusive right to the use in Great Britain of the word 'Apollinaris' for the purpose of describing the mineral water so sold by them," and "the plaintiffs are the first persons, or at least are the persons who now have established a particular trade-mark in Apollinaris water," *i.e.* they are entitled to succeed, not by virtue of their private contract, but as *owners of the trade-mark*. "The defendants," it was observed, "have manufactured this artificial water, which may be perfectly lawful for them to do, and they have advertised and sold it under the name of Apollinaris water, which, in my opinion, they have *no* right to do." Reading the judgment as a whole, it is manifest that the plaintiffs were

(1) (1875) 33 L. T. 242.

regarded as indisputably the *owners of the trade-mark*, if the trade-mark were a legitimate one, and it was on the ground of that ownership of the trade-mark, implying that they were the importers, not on the ground that they had an exclusive right by contract to the supply for sale, but that they had an exclusive right to use the word to which *their* reputation as importers attached, that the injunction was granted. Or, as it was stated in the arguments, they, the importers, and *not* their vendors or any one else but the plaintiffs themselves, had acquired a property in the word "Apollinaris." It is manifest that if in the case of *Richards* v. *Butcher* the trade-marks had meant that the wine was imported by the plaintiffs, then, though it would have been "perfectly lawful" for the defendants to import the same wine if they could and to sell it, yet they would have had no right to use the plaintiffs' trade-mark indicating importation by them.

The case of *Goodfellow* v. *Prince*[1] was also cited for plaintiffs in *Richards* v. *Butcher*, apparently with the view of showing that the plaintiff, an importer of wine, sold with a label "LeCourt et Cie," failed in his attempt to restrain defendant from selling wine with the same name on it, merely because the trade-mark was not registered in this country and the trade-name had not been established by sufficient length of user. But on examination of the case it appears that in that instance the plaintiff had "entered into an arrangement with Moigneauxpère et Fils for the supply to him of a particular growth of champagne *together with the exclusive right to adopt and use* in this country the label "LeCourt et Cie," so that he *was* the owner of the trade-mark and was prevented from instituting proceedings solely by non-registration in England under section 77 of the Trade-marks Act, 1883. The case is thus not on all fours with *Richards* v. *Butcher*, or with the present case, in which the trade-mark belongs, not to the importer, but to the exporter.

For the plaintiff in the present case the decision in *Ralli* v. *Fleming*[2] has also been relied on apparently with special reference to the head-note, which concludes with the words "*Semble*,—there may be a right to exclusive use of a trade-mark

(1) (1887) 35 Ch. D. 9.

(2) (1878) 3 Cal. 417.

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by traders who are importers only." Such a head-note is of little use if read without reference to the circumstances of the case, the arguments advanced, and the authorities cited and followed or ignored. The facts of that case were as in *Radde* v. *Norman* and the *Apollinaris Company* v. *Norrish* and not as in *Richards* v. *Butcher*. That is to say, "the suit was brought for an injunction to restrain the defendants from using the plaintiffs' trade-mark," not to restrain the defendant from using the trade-mark of a third party, the exporter. The points in issue included the questions whether the plaintiffs were entitled to the exclusive use of the number 2008, and whether such number was "known or recognized in the Calcutta market as indicating that the goods bearing it were imported by the plaintiffs." The defendants denied that it was so known or recognized, and asserted that the number 2008 was regarded by buyers as a mark indicating *quality* and *not as indicating the person* or *firm importing the goods*, and that the plaintiffs were not manufacturers, but only importers, and had no exclusive right to import such goods. The point for decision was, practically, not whether such principles as were laid down in *Richards* v. *Butcher* were *correct*, but whether the case was one to which the principles laid down in that case, or the principles laid down in *Radde* v. *Norman* and *Apollinaris* v. *Norrish*, would apply. In other words, the issue was whether the plaintiffs used the number 2008 as their *own* trade-mark as a symbol and guarantee of their own importation;—whether it represented their reputation as importers, or the reputation only of the manufacturing exporters. In the former alternative they could sue to protect their own reputation as importers and secure the advantage thereof as in *Radde* v. *Norman* and in the *Apollinaris case*: while if it were the manufacturing exporter's mark, attracting custom as such, the plaintiffs, obviously on the principles of *Richards* v. *Butcher*, could have no right to sue. And Garth, C.J., said (page 425): "It must here be borne in mind, and it is, in my opinion, a most material feature in the case, that the number 2008 was a symbol *used exclusively by the plaintiffs and impressed only upon goods which came from their house.* It was not a manufacturer's number, it was a symbol the use and meaning of which was not known to the defendant, and is not

now known to the Court. It was known to the plaintiffs only." And it was manifestly upon this ground that the plaintiffs sought only *to protect the custom* attracted or secured by a mark *indicating only their own position and reputation as importers*, that the suit was maintainable. The Court said (page 426): "The use of these marks upon similar cloth by the defendants would be calculated to deceive the public into the belief that the goods which they were buying were the goods which they had bought for years before *imported and sold by the plaintiffs*." The case therefore establishes the very reverse of the inference which the counsel for plaintiff in this case would deduce from it, as it shows that an importer can only protect a trade-mark representing his own reputation and the advantages accruing therefrom, but not the trade-mark of another, a manufacturer or producer.

This case of *Ralli* v. *Fleming* was cited in *Taylor* v. *Virasami*[1] and in *Barlow* v. *Gobindram*.[2] In *Taylor* v. *Virasami*, the plaintiff imported "a certain kind of shirting, and, in order to distinguish it, adopted a trade-mark." The head-note of that case is manifestly misleading in stating that "No trader importing goods can lawfully adopt a trade-mark which is calculated to cause his goods to bear in the market the same name as those of a rival trader"—if it means that one importer cannot sell goods under the same trade-mark of the same producer as that under which a rival trader sells his goods. If that were the case, no two traders could ever import or sell goods from the same producer with that producer's trade-mark on them, which would limit each producing exporter to a single customer in each country, a preposterous position which is in no way countenanced by the decision in a case where the trade-mark infringed was described by the Court as "plaintiff's trade-mark" and not as the exporter's at all.

The real question is whether the trade-mark used and sought to be protected by the importer is one employed by him and understood and preferred by the public as indicating importation by the person using it. This is very clearly brought out in the case of *Barlow* v. *Gobindram*.[3] The mark which plaintiffs in

(1) (1882) 6 Mad. 108. (2) (1897) 24 Cal. 364.
(3) (1897) 24 Cal. 364.

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that case sought to protect was a number 9000, and the question was whether that number indicated importation by the plaintiffs and thus attracted the preference of the public by reason of their reputation as importers. Plaintiffs alleged that they used the number to denote that the cloth which bore the number was of certain *quality*, and imported by them. But the Court observed, page 374: "It is consistent with the evidence that the reputation which the number acquired was a reputation for *quality* only. It does not necessarily follow that the purchasing public showed a preference for the goods because the plaintiffs imported them, or that the number as understood by the public represented that the goods were in fact imported by the plaintiffs." The plaintiffs in fact used other numbers which acquired but little reputation, though the cloth was the same and the importers the same, and the Court said (page 375): "It seems therefore reasonable to infer that any reputation the number 9000 acquired must have been independent of any association between the number and the plaintiffs as the importers in the minds of the purchasers." Again, a witness is referred to as having nowhere said that "the general reputation of the number 9000 in the market informs the purchaser that the cloth is plaintiffs," while on *some* cloth the name of the firm was written and on others there was the ticket showing who the importers are—facts "it is obvious which would inform the purchaser who the importer was, apart altogether from the number used on the cloth." Therefore the Court held (page 376) it would be unduly straining the evidence against the defendants to infer from it that the defendants were actuated by a desire to pass off their goods as goods imported by the plaintiffs.

The corollary from this case is that importers can only protect marks indicating importation by them. If their importation is not indicated by the marks but otherwise, as for instance by the style and name under which they trade as importers, they could not sue to restrain the use of the marks and (in the instance supposed) could only sue if *their trade-name* and style were deceitfully assumed by a rival. In the present instance it is not alleged either that any trade-marks indicating importation by Mr. Heiniger were imitated by the defendants, or that the

defendants used or imitated the style or name under which he trades as an importer. A trade-mark which represents, not the importer's reputation, but the manufacturer's, must therefore be under the control and protection of the latter, not of the former.

An interesting case bearing on the relative rights of producer and importer *inter se* in a trade-mark put on goods consigned to India at the instance of the Indian importer is *Re Riviere's trade-mark*(1) as showing how much of a trade-mark in such cases belongs to the importer. The case does not bear so closely upon the question now at issue as to require detailed discussion here, and it suffices to note that its result seems to show that the producer is the owner of so much of the trade-mark assigned for the time being to the importer as previous to that agreement belonged to the producer, and therefore the registration of that part of the trade-mark in England furnished no legal grievance to the importer, where such additional part of the mark as indicated the importer's name, and asserted and protected his local reputation, had not been offered by the producer for registration. Thus it seems the importer can only claim so much of a trade-mark as represents his own reputation as importer and is not in the legal sense aggrieved at any use of the trade-mark which belongs not to himself but to the producer.

*Lavergne* v. *Hooper*(2) deals with the same question as between foreign producer and Indian importer. The plaintiffs in that case alleged that they had used the trade-mark in question for brandies exported by them to a certain firm which had since *ceased to exist*; that subsequently defendants *selected* that label or trade-mark for brandies imported by them from plaintiffs engaging to sell no other brandies under that mark than such as were procured from plaintiffs, and had broken the contract by selling under the trade-mark brandies imported from other firms, and thus had infringed plaintiffs' trade-mark. The defendants denied plaintiffs' property in the trade-mark when introduced into India, alleged that they (defendants) had previously imported under the trade-mark, that it closely resembled but was not identical with one formerly used in the English market by plaintiffs but abandoned by plaintiffs, and that it had been

(1) (1885) 53 L. T. 237. (2) (1884) 8 Mad. 149.

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adopted by defendants, this right to the exclusive use thereof having been recognized by the plaintiffs without any contract to sell no brandies except plaintiffs' under that mark. "Seeing that the name entered on the label as that of the exporter was a fancy name, while that of the importer was the true style of the firm, it appears to us," said the Court (page 159), "to be a fair inference that the mark was intended to be the *special trade-mark of the importer* and not of the exporter." And the Court held that plaintiffs had either abandoned their own original mark or had estopped themselves from denying the right of the defendants' firm to adopt it, having in terms admitted it to be defendants' property. The defendants' firm "did not understand that its property in the trade-mark was conditional on its accepting a contract that only plaintiffs' goods should bear the mark," and plaintiffs, in correspondence with defendants, had referred to the label and brand as "your label" and "your property."

The importance of the bearing which this decision has on the present case lies in the fact that Messrs. Wille Schmidt have in no sense abandoned to plaintiff their right in the trade-mark registered by that Swiss firm, but as the evidence of plaintiff and of Haji Mahomed shows, retain that mark and no other in use for sale of their Roskopf watches in England and elsewhere. There has been no appropriation or assignment of the mark or any part thereof to plaintiff as importer.

The case of *Hirsch* v. *Jonas*[1] shows that when the label merely represents that the goods are the manufacturer's production, it does not belong, in the absence of contract, to the importer, even though he suggested it, but to the manufacturer. Jessel, M.R., said (page 586): "I can understand a man saying 'I am not the actual manufacturer of goods, but the selector of goods, and my reputation for cleverness and selection is so great, that goods marked with a mark to show that they had been selected and approved of by me will fetch a higher price in the market.' If Hirsch" (plaintiff) "had put on the box. . . 'Selected by Hirsch,' he might have had a case to prevent other people imitating that. It would show that the cigars selected were approved of by him.

(1) (1876) 3 Ch. D. 584.

If he got a great reputation in that way, I can understand he would have a right of protection for that which indicates to the public that the goods (cigars) are selected and approved of by him. That is not his case. There is nothing on the boxes to show anything about Hirsch at all." It was held he had no case whatever. That case was precisely on all fours with the present except that the plaintiff in that case had no contract for exclusive local supply—a detail which *Richards* v. *Butcher* shows is quite immaterial when the trade mark is the manufacturer's and indicates his reputation alone.

*Robinson* v. *Finlay*(1) may also be usefully referred to in this connection as showing that where manufacturer, shipping agent and importer have adopted a combination indicative of the interest of each, no one of them could claim to be entitled exclusively as against the others to that design when the adventure is put an end to, and the case of *In re Jones* cited by Sebastian on the Law of Trade-Marks at page 185 (Edition of 1899) shows that a contract, that after the adventure came to an end each party should be entitled to use and register such marks, could not have been enforced, since the result would have been to deceive the public. This leads to the important inference that a man cannot claim the exclusive right to use, or, what is the same thing, prevent anybody else from using a trade-mark which does not represent his own reputation but somebody else's. The foundation of the principle apparently is that referred to by Lord Herschell in *Reddaway* v. *Banham*,(2) as laid down in *Croft* v. *Day*(3) by Lord Langdale, and in *Leather Cloth Company* v. *American Leather Cloth Company*(4) by Lord Kingsdown, when the doctrine of Lord Westbury in *Hall* v. *Barrows*(5) and in the *Leather Cloth Company case*(6) that "the jurisdiction of the Courts in the protection given to trade-marks rests upon property" was called in question, and "the fundamental rule" was declared to be "that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot therefore be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to

(1) (1878) 9 Ch. D. 487.
(2) (1896) App. Ca. 199 at pp. 209.
(3) (1843) 7 Beav. 84.
(4) (1865) 11 H. L. C. 538.
(5) (1863) 33 L. J. Ch. 204.
(6) (1863) 33 L. J. Ch. 199, pp. 200-201.

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believe that the goods which he is selling are the manufacture of another person." This distinction was said by Wood, V.C., in *M'Andrew* v. *Bassett*(1) to be "a mere question of nomenclature," and he speaks of the right to a trade-mark as "the right of the plaintiff who comes for assistance to protect himself against fraud by others using that which he has appropriated as designating his goods, and so palming off, upon the public, goods made by them as goods made by him." Thus the tendency of the later rulings seems to point to the right to exclusive use and protection as arising not from the property in the trade-mark so much as from the wrong to the public from the misleading and deceiving the public or purchasers, and the right to such redress for such a tort as can only be claimed by a person to whom it causes special damage. But from either point of view, whether the manufacturer's right to protect his trade-mark be based on his property therein, or whether he is entitled to redress only because the public is misled and he suffers thereby special damage, it is clear that he alone is entitled to the exclusive use, that he and no one else can claim or protect that special use, and that no use or claim to the exclusive use by anybody else could be allowed, not merely on his account, but because it would be an injury to the public. And thus Underhill in his work on Tort, citing *Leather Cloth Company* and *Richards* v. *Butcher*, says that "Although a trader may have a property in a trade-mark sufficient to give him a right to exclude all others from using it, yet if his goods derive their increased value from the personal skill or ability of the adopter of the trade-mark, he will not be allowed to assign it, for that would be a fraud upon the public, though a trade-mark not dependent for its value upon such personal merits may be assignable—*Bury* v. *Bedford*(2)—along with the goodwill of the business to which it belongs, but not apart from that goodwill—(46 and 47 Vic., c. 57, section 70.)" (See also Sebastian on Trade-Marks (Ed. 1899), pages 91, 99). And so *In re Apollinaris Company's Trade-marks* case(3) ruled that an importer of foreign goods *cannot* register as his own a trade-mark of the foreign producer, whether the goods are produced by a

(1) (1864) 33 L. J. Ch. 561, pp. 563. (2) (1864) 33 L. J. Ch. 465.
(3) (1891) 2 Ch. 186.

course of manufacture or by a process of nature, nor whether the importer has or has not an exclusive contract for this country (*i.e.* Great Britain), nor whether the producer does or does not consent to the registration. The reasons clearly are twofold: first, that if an importer (in this case for instance, if Mr. Heiniger) could claim the trade-mark of the producer (in this instance Messrs. Wille Schmidt), it would follow that the importer (Mr. Heiniger) could not only prevent any one else from selling what he had lawfully purchased elsewhere as the manufacture of the producer (Messrs. Wille Schmidt & Co.), but further the importer (Mr. Heiniger), having the right to the trade-mark, might place it on any goods manufactured by himself or any one else, and thus the public, relying on the trade-mark as a guarantee of the manufacture by the foreign producer, would be misled. It is evidently on these grounds that an importer cannot claim the exclusive use of a trade-mark not his own, and therefore cannot restrain an infringement thereof. Secondly, it is manifest that if the producer assign to one importer the exclusive right to use his trade-mark, without also assigning to him the entire output, past, present and future, a fraud would be practised on other purchasers from the producer who would be prevented from disposing of what they had purchased from the producer as goods guaranteed to be of his manufacture. And thus other persons, whom the producer himself could not restrain, would be restrainable by his assignee. But Fry, L.J., was careful (*In re Apollinaris Company's* trade-marks) to observe (page 226):

"We are not concerned here with a case in which an importer may use the mark of a manufacturer with an addition indicative of the goods having been imported by him: but the mark of a manufacturer pure and simple cannot rightly be assumed by an importer from that manufacturer, or by a person who buys from that manufacturer, unless indeed where all the goods of the manufacturer go to that importer or that dealer. If they did not, other goods of the manufacturer might reach the hands of other dealers, who might justly affix to them the manufacturer's mark. . . . If Saxlehner's (the foreign producer's) assent would justify the registration, it would follow that a manufacturer in Paris, using a trade-mark well-known in England, could allow A to register it as his trade-mark and thereby prevent B and C, who bought from the Paris maker, from selling in England."

That is precisely the case in the present instance, if for registration be substituted the equivalent in India, namely the

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exclusive right to use a trade-mark. And it may be further observed that in the case just quoted, Fry, L.J., specially referred (page 228) to the case of *Apollinaris Company* v. *Norrish* as one in which there was a doubt, unnecessary to discuss, as to its being traceable to the trade-marks; and reference was also made (page 232) to other cases in which "the presence of these marks had been used to hamper the trade in such waters." The further remarks (at pages 230 and 231) show that even had the importers subsequently become full owners of the entire output, registration and therefore exclusive use and right to restrain, could not validly be claimed by the importer as a matter to which he had been entitled at a time when he had a lesser right.

But the plaintiff does not in this case claim to have an exclusive right to the entire output, past, present and future of Messrs. Wille Schmidt's Roskopf watches. Nor does he ever allege that he has obtained or contemplates obtaining the trade-mark which represents their celebrity as makers thereof. He is a bare importer among other possible importers of watches of a certain make. The watches he actually buys are his, but not the trade-mark or the reputation it betokens. His reputation as an importer is not indicated or protected by anything in the marks alleged to be infringed. For a producer to affix at the importer's request a label designated by the importer and denoting only the importer's reputation as a selector or importer is of course a very different thing from an assignment by the producer of his own mark to the importer. The latter would be invalid as misleading the public with regard to the producer: the former would be allowable as stating only the true facts as to selection and importation.

But in the present case plaintiff has no mark as importer and claims the mark of the producer. He has left in the hands of Messrs. Wille Schmidt both the responsibility for the protection of that mark and the power to protect, and has only a right on his contract *in personam* against Wille Schmidt, if the benefits which he expected to derive from that contract are not realized. What are the benefits he is entitled to must depend on the contract, not on the advantages of a reputation which he does not, and could not, claim for himself, and which therefore he could not protect as against third parties. His own reputation

as importer he has not relied on as the attraction to the public, for the trade-mark does not indicate that, and it has not been attacked. If he desire to rely upon that source of attraction, he can certainly by an additional trade-mark assert it and then can protect it against imitators. But he cannot allege that imitations of another person's trade-mark, however immoral or unlawful, give him a right to sue. It may be there is a fraud upon the public, but as observed by the Lord Chancellor in *Webster* v. *Webster*,(1) "The fraud upon the public is no ground for the plaintiff's coming into Court" (see also Lord Westbury in *Leather Cloth Company* v. *American Leather Cloth Company*(2)). Till the passing of the Exhibition Medals Act, 1865 (26 and 27 Vict. c. 119), *vide* section 2, a false representation by a trader that he had obtained a medal gave no right to proceed to any one who could not prove damage therefrom to his own trade-mark;(3) nor can a fraud upon another person give a right of action to one who has nothing more than a contract with such other person. It may be that the defendants have attempted to palm off the goods in question as if they were goods manufactured by Wille Schmidt, but it is not alleged that they have attempted to palm them off as goods imported by the plaintiff. Plaintiff has a right to sell what he has imported as goods imported by himself, and can, as already observed, protect that right by an additional trade-mark indicating such importation if he thinks it the source of attraction and value. But the exclusive right to use Wille Schmidt's trade-mark is not his. He admits that it is not, and that is under the control and protection of the Swiss firm. If that firm is unable or unwilling to protect it adequately, or to the extent that plaintiff desires, the plaintiff may have his remedy against them. It is of course conceivable, from anything that appears from the record in this case, that Wille Schmidt might find themselves embarrassed by relations and circumstances affecting them in asserting an exclusive right to their trade-mark. And the plaintiff cannot, on the one hand, be allowed to jeopardise that right by assuming its protection, or, on the other, to avail himself of it unburdened by such restrictions as may exist to prevent the owner of it from

(1) (1791) 3 Swanston, 490 note. (2) (1863) 33 L. J. Ch. at p. 200.
(3) *Batty* v. *Hill* (1863) 1 H. & M. 264.

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moving further in the matter. The existence of such conceivable difficulties cannot be discussed in this case. They would be irrelevant: and indeed the plaintiff's counsel has objected on that ground to some evidence, such as the recent registration by Messrs. Gräber of a trade-mark including the word "Horoscope" and a suit relating to the use of the word "patent" which it might be most material to consider in connection with the right of Messrs. Wille Schmidt to the trade-mark alleged to be theirs. Moreover, the present claim of the plaintiff to exclude all watches bearing the Roskopf mark from the Indian market, may be, and presumably is, in excess of any right which the owners of that mark themselves could set up in respect of consignments obtained indirectly from former purchasers in other countries. From these and other points of view it appears that the plaintiff has unfortunately misunderstood his position and rights and that he cannot in his own name successfully maintain this suit. The decision on the first two issues must therefore be in the negative.

On the third issue, it is clear that the defendants have not attempted to pass off any watches as imported by the plaintiff, as plaintiff had not indicated such importation in the trade-mark alleged to have been imitated, and no assumption by defendant of his name and style of trading is alleged. The fourth and fifth issues it is unnecessary and inappropriate to discuss at this stage as they could not be definitively decided in the suit as constituted.

It remains to consider, however, certain contentions raised as to the procedure that should now be taken. These are (briefly stated) that under section 32 of the Code of Civil Procedure the name of any person who ought to have been joined may at any time be added; that under section 27, when a suit has been instituted in the name of the wrong person as plaintiff, or when it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage if satisfied that the suit has been so commenced through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person ... with his ... consent, to be added or substituted as plaintiff and upon such terms as the Court thinks just: that under section 34 all objections for want of parties or for joinder of parties who have no interest in the suit

or for misjoinder shall be taken at the earliest possible opportunity and in all cases before the first hearing, and any such objection not so taken shall be deemed to have been waived by the defendant, and lastly, that under section 136 the defendant, having failed to comply with an order under Chapter X for discovery and inspection, is liable to have his defence struck out and to be placed in the same position as if he had not appeared and answered.

The first of these contentions under section 32 seems untenable and was not much pressed. The plaintiff had no cause of action or ground of action whatever and this defect could not be remedied as far as his suit was concerned by any joinder of parties. What was necessary was not joinder, but substitution, and with substitution section 32 does not deal. Section 27 is no doubt more in point, as it authorises substitution at any stage with the consent of the person substituted. Mr. Raikes for the defendants anticipated these contentions by citing *Bhanu Tukaram Shet* v. *Kashinath*,(1) *Sayed Abdul Huk* v. *Gulam Jilani*,(2) *Walcott* v. *Lyons*,(3) as to costs if such application be allowed, and *Ayscough* v. *Bullar*.(4)

Mr. Robertson, on the other hand, relies on *Richards* v. *Butcher*, where substitution was allowed, *Radde* v. *Norman*,(5) *Ravji* v. *Mahadev*,(6) and *Subodini Debi* v. *Cumar Ganoda*.(7)

The case of *Bhanu* v. *Kashinath* treats of *joinder* under section 32 and is therefore not precisely in point. The case of *Sayad Abdul Huk* v. *Gulam* would be more relevant, as the application of defendant to be joined as plaintiff was urged under section 27 as well as under sections 31 and 32, but that the reason for not granting his application was that he had parted with all his rights. The case of *Walcott* v. *Lyons* was decided under the English Order XVIII., the words of which (quoted at page 586 of the report) refer to joinder. But the ground of the decision was that the plaintiff having impeached as a breach of trust an investment made at his request, the question in the case was

(1) (1895) 20 Bom. 537.
(2) (1895) 20 Bom. 677.
(3) (1885) 29 Ch. D. 584.
(4) (1889) 41 Ch. D. 341.
(5) (1872) L. R. 14 Eq. 348, 356.
(6) (1897) 22 Bom. 672.
(7) (1887) 14 Cal. 400.

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whether there had been any breach of trust of which the plaintiff had a right to complain, and that for the decision of that question the joinder of the plaintiff's son, who had a contingent interest, was not necessary. Bowen, L.J., however, dissented in *Ayscough* v. *Bullar*, the order allowing amendment and joinder was made under order XVI. rule 2 (quoted at page 342 of the report, footnote) which corresponds in wording with section 27 of the Code of Civil Procedure. The amendment was allowed because the original plaintiff proved to have derived her title from the defendant against whom she sought to enforce a covenant entered into by him with the vendor of the added plaintiff. But it is to be noted that the Court allowed the amendment and joinder because the real matter in dispute, for the determination of which it was necessary to order the addition of a plaintiff, was the true meaning and construction of the covenant and whether it was intended for the common benefit of the houses owned by both the original and the added plaintiff (*vide* page 342 stating the facts). The act done by the defendant was injurious to both, and the only question was which was the right plaintiff. Now, under section 27 of the Code of Civil Procedure, the same essential is required, *viz.* that the order for substitution or addition should be necessary for the determination of the real matter in dispute. There can be little doubt in the present case that the suit has been instituted *bona fide* by the present plaintiff, and the only question that remains is whether the real matter in dispute between the present plaintiff and the defendants is the matter which renders the substitution of Messrs. Wille Schmidt and Co. for the present plaintiff necessary. And on this point there seems to be considerable room for doubt. For, in the present form of the suit, the allegation is that the defendants have imitated the *importer's* trade-mark, the exclusive right to use which in this country is alleged to have been established. That allegation would, if substantiated, prevent the imitation of the mark, entirely irrespective of any rights attaching to the manufacturer's trade-mark, and therefore also irrespective of any limitations that might affect and restrict the manufacturer's right to his trade-mark. Protection might be claimable for the mark if it were the importer's and indicated only selection and

importation by him. But if the mark is the manufacturer's, other questions must necessarily arise for determination connected with the extent of the manufacturer's right to adopt and protect it in the country of its origin and consequently in all possible markets in which it may be introduced. Thus the real matter in dispute in the suit, as instituted, was a claim to different rights from those which would render necessary a suit by a producer and the substitution of his name for plaintiff's. This the present plaintiff has himself unconsciously demonstrated by objecting to the relevancy of evidence against himself as to the producer's right to use the word "patent" and as to the final result of his contest with Messrs. Gräber, a rival manufacturer, in relation to the latter's right to use the word "Horoscope."

This does not appear to be a case therefore in which the rights claimed and in dispute are the same as those which would be in dispute between defendant and the plaintiff whom it is proposed to substitute. The two plaintiffs would have different contentions to meet. Those objected to as irrelevant by the present plaintiff as to the nature of *his* right would be most material in the case of the substituted plaintiff. It would therefore seem that the case of *Ravji* v. *Mahadev*,[1] cited for plaintiff, is inapplicable in the present instance. For in that case the original plaintiff had sued to establish, by virtue of a benámi purchase, rights which he professed to be precisely those of the plaintiff to be substituted. But here the plaintiff has asked for an adjudication on his rights as importer, and not on the rights which Messrs. Wille Schmidt may or may not have as against Messrs. Gräber and all other producers. The plaintiff has not alleged that his rights are derived solely from and are identical with those of Messrs. Wille Schmidt, but has, on the contrary, resisted attempts by defendants based on the identity of plaintiff's rights with those of the producer. The case of *Subodini Debi* v. *Cumar Ganoda*,[2] also cited for plaintiff, seems for the same reasons inapplicable, for there the plaintiff claimed only precisely the same rights as his employers who were substituted for him. The case of *Radde* v. *Norman* does not appear

(1) (1897) 22 Bom. 672.

(2) (1887) 14 Cal. 400.

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to be in any way relevant on this point. It is true that the agent of the owner of the trade-mark claimed was one of the plaintiffs, but the owner himself was also *an owner* and there was no question of substitution. The case of *Richards* v. *Butcher* seems also inapplicable for similar reasons. For, there not only was the point raised (*vide supra*) when the proceedings were by way of demurrer, but the statement of claim alleged that the plaintiffs were agents of the proprietors of the trade-mark and did not allege an infringement of their *own* trade-mark, so that they identified their rights from the outset with the rights of their principals which they sought to protect as their sole agents. If the plaintiff had in the first instance abstained from describing the mark as his, and thereafter abstained from objecting to the relevancy of evidence which was material against the owners of the mark, the case would no doubt have been different.

But even apart from the question whether under section 27 the Court would have had power to order the substitution for plaintiff of Messrs. Wille Schmidt & Co., the case having been conducted up to the end by the plaintiff on lines which necessarily involved the exclusion of evidence bearing on the producer's rights and liabilities, does not seem to be one in which the substitution should in the exercise of a sound discretion be ordered. For there would be no substantial advantage in such an order at this stage. The defendants might, for anything that appears in this case, require such discovery, inspection and production of documents and other matters in a suit to which Messrs. Wille Schmidt would be parties, as could not have been required or would have been resisted in this case and the whole matter would practically have to be tried *de novo*. It is of course open to Messrs. Wille Schmidt & Co. to institute proceedings on the morrow of this decision, if so advised, and they will then have an opportunity of meeting the whole of the objections that can be urged against the rights they claim Mr. Robertson stated at the end of the case that the plaintiff was in possession of a power-of-attorney authorising him to take proceedings on behalf of Messrs. Wille Schmidt in respect of the trade-mark, and the power was handed up for inspection by the Court. But it was not admitted by the other side that the power was sufficient. The questions that would arise, in determining its

sufficiency, could hardly have been discussed so long after the close of the plaintiff's case, and, if the plaintiff has really been in possession throughout of a power to sue in the owner's name, he is hardly entitled to assert it at the last moment when he might have exercised the power from the outset and thus removed the objections he has urged to the relevancy of evidence which would affect his principal.

Mr. Robertson has urged that under section 34 the objection of defendants to plaintiff's suing must be held to have been waived. But section 34 refers to objections for want of parties or joinder or misjoinder, and not to objections on the ground of want of a cause of action or right of suit in the plaintiff which may not be disclosed until the case has been proceeded with and evidence has been taken. The plaintiff in his plaint in this suit described the mark as his own, and it was not apparent from the outset that it was in no sense indicative of selection or importation by him, and that it was not his property. The objection therefore could not have been waived by the defendants. The plaintiff has unfortunately claimed some one else's trade-mark as his own, and asked relief on that basis, and the defect was in his title, and not merely in the omission to add the real owner whose interest entirely excluded his own.

The last contention for plaintiff is that the defendants should have their defence struck out, under section 136, for failure to comply with the order under Chapter X of the Civil Procedure Code. But it seemed to the Court that the defendant examined in the case, Mr. Amotritz, being a foreigner, was entitled to have some allowance made for failure fully to understand the effect and extent of the requisition made. The question raised when the first order for a supplemental affidavit was given, related to correspondence between his firm and Messrs. Gräber, and his attention had not in any way been directed by the cross-examination up to that point to any other correspondence as required for discovery, inspection and production, and in any case the other defendant, Mr. Droz, was no party to the failure of Amotritz to comply. But it appeared to the Court more probable that there was a failure to understand rather than a failure to comply, the defendant on fully realising what was required,

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having put no difficulties in the way of immediate discovery and inspection.

The only question that now remains for consideration is the question of costs. The defendants' counsel claims that the suit should be dismissed with costs and this in ordinary circumstances would have been the result of the plaintiff's error. But it is manifest that the mistake made by the plaintiff was a perfectly *bonâ fide* one: the right of an importer to sue on the manufacturer's trade-mark appears never to have come under consideration of the Courts in India before—suits by importers in India having generally been of the nature of that in the *Badische Aniline &c. Fabrik* v. *Maneckji*.[1] The plaintiff attempted no *suggestio falsi* or *suppressio veri* in his plaint or in his deposition. His conduct throughout has been open, straightforward and honourable, and it is only an evidently *bonâ fide* mistake as to a somewhat difficult point of law with regard to the respective rights of the producer and the importer that has rendered his suit so imperfect in its constitution as to be unsustainable. The defendants, on the other hand, instead of making that ground a preliminary objection, have referred to the trade-mark in their written statement as the plaintiff's: they have denied every allegation of fact contained in the plaint, and even gone so far as to deny their own knowledge of facts which their own correspondence shows had been anxiously discussed by them—*vide* Exhibits A-9 to A-16 and especially Exhibit A-13. And instead of straightforwardly disclosing the more or less technical objections to plaintiff's suit as brought, and thus avoiding the accumulation of costs which these protracted proceedings have entailed, they have unnecessarily and it seemed to the Court wantonly spun out the case by futile contentions as to microscopical differences between the plaintiff's trade-mark and that which they have used. Without any desire to prejudge in any way the ultimate decision to be arrived at in a suit properly constituted as to the similarity of the trade-mark in this case, it seems, in connection with defendant's responsibility for the length of this proceeding, necessary to remark that it is only wasting the time of a Court to contend that such a question

(1) (1893) 17 Bom. 584.

can be decided by considering distributively the minute details of two combinations, irrespective of the result of the whole. And this is more particularly the case when the trade-marks are so small as to lie between the figure XII on the dial and the hands of the watch. This consideration was noted by Lord Cranworth in *Leather Cloth Company* v. *American Leather Cloth Company*,[1] where he said with reference to the size of a trade-mark : "I mention this because, if instead of occupying the large space, the whole had been engraved on a stamp of the size of a sixpence or a shilling so as not to be capable of being read without the aid of a magnifying glass, or even without close examination, the case would have been different. A person purchasing leather cloth so stamped might fairly say : 'I did not attempt to decipher what was stamped on the article which I bought. I saw it had on it what appeared to be and what I could not discover not to be the plaintiff's stamp and I therefore took it for granted that it was the produce of the manufactory.'" It is idle and vexatious to base a defence in a suit as to the resemblance between trade-marks, on the substitution of minute arrowheads for minute asterisks, or of a stelliform combination of indistinguishable symbols for an ordinary star, in a device which might be covered by a two-anna piece. The salient points of the device which would impress a purchaser are the faint red concentric circles, the centre with the starlike pattern on a dark back ground, and the actual name of the watch. And these salient features the defendants have not denied to be common to both watches, but they have nevertheless produced nearly twenty watches which have none of these salient points in combination, and protracted the proceedings by minute examination as to isolated points of resemblance between them and the plaintiff's trade-mark. The defendant examined in the case was eminently unsatisfactory both in his demeanour and in the substance of his deposition, reluctant and contentious under cross-examination, eager and forward in his answers to his own counsel. It was impossible to regard as otherwise than disingenuous his professed inability to discover a greater resemblance between the Horoscope and the Roskopf watches than between the latter and the Necco No. 8, the Bollo No. 7. The denial of all knowledge

(1) (1865) 11 H. L. C. 523 at p. 536.

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of admissions damaging to his case and of facts which were indubitably within his knowledge was still more unmistakeably disingenuous, and as it is clear that if, instead of protracting the case by prevarications and unjustifiable contentions, he had in his written statements, or unmistakeably at an early stage in the suit, disclosed his intention of impugning plaintiff's interest in a trade-mark referred to in the pleadings of both parties as the plaintiff's, the case would have been disposed of or reconstituted either without an appearance of either party or at least the costs of these protracted proceedings would have been almost entirely, if not altogether, avoided.

Under these circumstances, in dismissing the plaintiff's suit, no order is made as to costs.

*Suit dismissed.*

Attorneys for plaintiff:—*Messrs. Bicknell, Merwanji and Motilal.*

Attorneys for defendants:—*Messrs. Smetham, Bland & Noble.*

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## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

1900. *November* 21.

BAI JADAV AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 3), APPELLANTS, *v.* NARSILAL AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

*Vatan—Vatan in Guzerat—Service commutation settlement—Inheritance—Succession to a vatan—Succession through females—Bombay Act III of 1874, section 5, as amended by sections 1 and 2 of Bombay Act V of 1886—Alienation of vatan.*

A *vatan* in Guzerat does not cease to be *vatan* property as defined by section 4 of Bombay Act III of 1874, merely because a service commutation settlement has been effected. Such a settlement does not change the nature of the property simply because service is not demanded.

As far as the power of alienation is concerned, if it is granted by the settlement, it cannot be taken away by the change introduced in section 5 of Bombay Act III of 1874 by section 1 of Bombay Act V of 1886.

Section 2 of Act V of 1886 (which amends section 5 of Act III of 1874) gives a preference to male members of the vatan family over persons claiming through females.

* Second Appeals Nos. 192 and 234 of 1900.

*Held*, that the section applies to vatans in Guzerat, even though the services originally appertaining to such vatan had ceased to be demanded.

One Niamatrai was a *vatandár* in Guzerat. He died in 1844, leaving behind him a widow, a daughter, and a separated brother. His property consisted of certain *pasaita* lands and a cash allowance attached to his *vatan*. In 1868 Government effected a service settlement with the *vatandár* by which the *vatan* property was continued to *Niamatrai's* heirs, free from all liability to render any services in connection with the *vatan*. In 1889 Niamatrai's widow died, her daughter having predeceased her. Thereupon plaintiffs, who were the sons of *Niamatrai's* daughter, sued to establish their title as heirs to the *vatan* property as against the defendants who were the son's sons of Niamatrai's separated brother.

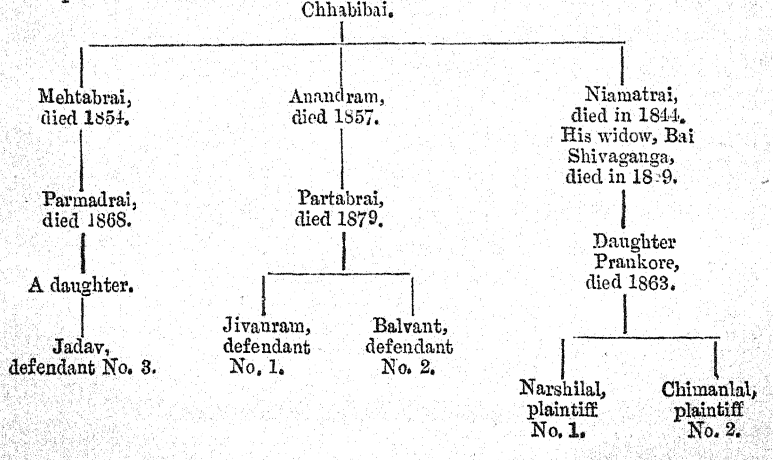
*Held*, that under section 2 of Bombay Act V of 1886, plaintiffs, as claiming through a female, were not entitled to succeed to Niamatrai's *vatan* property in preference to the defendants who were male members of the deceased *vatandar's* family.

SECOND appeal from the decision of Ráo Bahádur Krishnamukh A. Mehta, Acting First Class Subordinate Judge, A.P., of Broach, reversing the decree of Khán Sáheb J. E. Modi, Second Class Subordinate Judge at Ankleshwar.

One Niamatrai, a hereditary *vatandár* of the Broach District, died in 1844 possessed of certain lands and an annual cash allowance of Rs. 34-6-4 received from the Government Treasury. This property was his service *vatan* property.

He left him surviving a widow, Bai Shivaganga, a daughter, Prankore, and two separated brothers, Mehtabrai and Anandram.

The following table explains the relationship of the parties to the present suit:



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In 1856 Shivaganga, widow of Niamatrai, brought a suit against her nephew Parmadrai, son of Mehtabrai, alleging that after her husband's death, Mehtabrai and his son had dispossessed her of the *pasaita* lands and got the cash allowance transferred to their names.

This suit was privately compromised, and it was agreed that the lands and the cash allowance should be held by Parmadrai on his undertaking to discharge Niamatrai's debts and pay his widow, Bai Shivaganga, a yearly allowance of Rs. 42 during her lifetime.

In accordance with this compromise, a consent decree was passed in 1857.

In 1863 Shivaganga's daughter, Prankore, died, leaving two sons, Narshilal and Chimanlal (the plaintiffs).

In 1868 the services attached to the *vatan* were dispensed with and a sanad issued by Government to the following effect:

"The *vatan*, as now confirmed, shall be continued without demand of service or any objection or question on the part of Government as to title to whomsoever shall from time to time be the lawful holder thereof, but without affecting the rights and interests of other parties."

In 1889 Bai Shivaganga died.

In 1896 plaintiffs Narsilal and Chimanlal (grandsons of Niamatrai by his daughter Prankore) filed the present suit as reversionary heirs of Niamatrai, to recover possession of his property consisting of the *pasaita* lands and the cash allowance received from the Government treasury.

Defendants 1 and 2, Jivanram and Balvant, pleaded *inter alia* that under Bombay Act V of 1886, section 2, they as grandsons of *Niamatrai's* brother, Anandram (sons' sons), were preferable heirs to Niamatrai as against the plaintiffs, who, being sons of Niamatrai's daughter, were heirs claiming through a female. They also contended that the suit was time-barred and *res judicata* by reason of the consent decree passed in the suit of 1856.

Defendant No. 3, Bai Jadav (grand-daughter of Niamatrai's other brother), raised similar defences.

Defendants 4 to 7, who were mortgagees in possession under defendants 1 and 2, disputed plaintiff's title.

The Subordinate Judge held that under the sanad granted by Government the property became private alienable property and that the provisions of Bombay Act V of 1886 did not apply to *vatans* in Guzerat, in respect of which a settlement had been made for commutation of services. He however held that the suit was time-barred and that the compromise effected in the suit of 1856 operated as *res judicata*. He therefore dismissed the suit.

In appeal the Acting Additional First Class Subordinate Judge, A.P., agreed with the Court of first instance that Bombay Act V of 1886 was not applicable to *vatans* in Guzerat. But he held that the suit was not time-barred and that the decree based upon the compromise in the suit of 1856 did not operate as *res judicata*. He therefore reversed the decision of the Court of first instance and passed a decree declaring that the plaintiffs were entitled to inherit the whole of Niamatrai's property.

Against this decision defendants 1 and 2 preferred a second appeal (No. 234 of 1900) to the High Court.

Defendant No. 3 also filed a separate appeal, No. 192 of 1900.

*C. H. Setalvad* (with *H. C. Coyaji*) for appellants (defendants Nos. 1, 2, and 3):—We submit that the property in dispute is *vatan* property as defined by section 4 of Bombay Act III of 1874. Government have no doubt dispensed with the services connected with the *vatan*. But that circumstance does not change the nature of the property. If before the settlement it was *vatan* property it continues to be such even after the settlement—*Ramrao* v. *Yeshvantrao*[1]; *Savitriava* v. *Anandrav*.[2] This rule is as applicable to *vatans* in Guzerat as it is to *vatans* in the Dekkhan or in any other part of the Bombay Presidency. The service settlement effected with the *vatandárs* in Guzerat, no doubt, makes their *vatans* alienable; but the character of the property is not affected by it. It follows therefore that the plaintiffs, as persons claiming through a female, must be postponed under section 2 of Bombay Act V of 1886 to the male members of the *vatandár's* family. Plaintiffs' suit therefore must be dismissed.

(1) (1885) 10 Bom. 327. (2) (1875) 12 Bom. H. C. R. 224.

1900.

BAI JADAV v. NARSILAL.

*G. K. Parekh* for respondents (plaintiffs) :—Under the settlement effected in 1868 between Government and the *vatandár*, the property in dispute ceased to be *vatan* property. There is no longer any hereditary office or any service attaching to that office and the property has become ordinary alienable property—*Radhabhai* v. *Anantrav*.[1] According to the sanad issued by Government the *vatandár* has an express power of alienation. This power cannot be taken away by a subsequent enactment such as Bombay Act V of 1886. And therefore neither section 5 clause 2 of Bombay Act III of 1874, nor section 2 of Bombay Act V of 1886 applies to the present case. Supposing that the Acts apply, plaintiffs cannot be said to claim through a female; for they claim in their own right as grandsons and not as heirs of their mother.

RANADE, J.:—The appellants' counsel, Mr. Setalvad, raised several contentions—first, of limitation; second, of *res judicata*; third, about the application of Act V of 1886 to the vatan property in dispute. It was agreed that the last of these questions should be first disposed of, and accordingly Mr. Gokuldas, respondents' pleader, addressed his remarks chiefly to that point, reserving his arguments on the other points to a later stage.

Mr. Setalvad contended that the property in dispute was vatan property as defined in section 4 of Act III of 1874, being held in respect of an hereditary office, even though the services originally appertaining to it had ceased to be demanded, and that section 5 of Act III of 1874, as amended by Act V of 1886, applied to such vatans, and section 2 of Act V of 1886 gave preference to male members of the vatan family over persons claiming through females. Therefore the appellants were entitled to such preference over the respondents.

Mr. Gokuldas, on the other hand, argued that, as the settlement had taken place and a service commutation had been effected, the property cannot be regarded as vatan property held on account of a hereditary office, and that therefore section 5 clause 2 of Act III of 1874 and section 2 of Act V of 1886 did not apply to this property.

(1) (1885) 9 Bom. 198. F. B.

Both the lower Courts have taken this latter view of the nature of the property in dispute. The lower Appellate Court has not discussed this point at length, but has agreed generally with the Court of first instance. This latter Court held that as there was a commutation effected by the sanad (Exhibit 130, 25th August 1868,) the nature of the property was changed and therefore section 2 of Act V of 1886 did not apply. It made a distinction between settlements effected under what is called the "Gordon Settlements," under which the power of alienation was not conferred on holders, and the Guzerat settlements where such power was expressly conferred on the holders, and made the property alienable and heritable like any other private property, and therefore the decisions in *Appaji* v. *Keshav*[1] and *Bhau* v. *Ramchandrarao*[2] did not govern the present case. Any other view, it was said, would involve a breach of faith on the part of Government, and therefore, in spite of the definition of vatan property in Act III of 1874, the word "vatan" must be held in section 2 of Act V of 1886 not to include vatans in Guzerat, where the settlement had been effected and service abrogated. The first Court was of opinion that the section required amendment. This was also the view which Mr. Gokuldas pressed upon our attention.

On a careful consideration of the arguments urged on both sides, we feel satisfied that the view taken by the Courts below on this point as to the nature of the property is not correct and that vatan in Guzerat does not cease to be vatan property held in connection with an hereditary office as defined in section 4 of Act III of 1874, simply because a service settlement has been effected and the word "vatan" used in section 2 of Act V of 1886 is not to be understood in a restricted sense by reason of such settlement. It would be seen that though the Court of first instance took another view of the matter, it did so on the supposition that the section required amendment; in other words, that the Legislature was mistaken in not qualifying the word "vatan" in section 2 of Act V of 1886 so as to exclude service vatans settled in Guzerat. Such an assumption cannot be made in the face of the fact that Act V of 1886 was passed expressly

(1) (1890) 15 Bom. 13. (2) (1895) 20 Bom. 423.

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to supply what the Legislature regarded as an important omission in Act III of 1874. The Legislature was satisfied on inquiries held that the feeling against females being allowed to inherit vatan property was a general one throughout the Presidency, and though the people concerned did not wish that females should be entirely excluded, yet they desired that they should be postponed in the order of inheritance to males. Section 2 was included to give effect to this feeling, and it is quite clear that, unless by reason of settlement vatan property ceased to be vatan, the new section 2 would apply.

The definition of "hereditary office" expressly includes offices where the services have ceased to be demanded. In section 5, clause 2 also treats vatan as vatan property even though a service settlement had been effected either under section 15 or before that section came into force. A distinction should be made between the power of alienation without sanction of Government referred to in amended section 5 of Act III of 1874 and the new rule of succession laid down by section 2 of Act V of 1886. Mr. Gokuldas appeared to have confounded the effect of these two provisions. As far as the power of alienation is concerned, there can be no doubt that clause 2 of section 5 would not apply to Guzerat vatans, where the settlement recognised the right of alienation without sanction, but such settlement did not change the nature of the property merely because service was not demanded. It continued to be vatan property held in connection with a hereditary office. Though the restriction about alienation without sanction did not apply to such settled vatans in Guzerat, the particular change in the rule of succession was a different matter, and it applied to all vatans whether settled or not settled, whether in Guzerat or in the Dekkhan. If the Legislature had intended to exempt Guzerat settled vatans, nothing would have been easier than to lay it down accordingly. It did not exempt these Guzerat vatans from this new incident attached to vatan property in general by section 2 of Act V of 1886. The statement of objects and reasons expressly recites that the feeling against female succession was general throughout the Presidency. It is worth noting that clause 2 of section 15, which refers to old settlements effected before Act III of 1874 was passed,

has been repealed by Act XVI of 1895, apparently because clause 2 of section 5 was substituted in old section 5 by Act V of 1886.

We are disposed to agree with Mr. Gokuldas in his contention that the power of alienation, where it was granted by the settlement, cannot be taken away by the change introduced in section 5 of Act III of 1874 by section 1 of Act V of 1886, but we cannot accept this view that the property ceased to be vatan property held in connection with an hereditary office. It is not open to us to insert restrictive words not to be found in the definition in section 4 of Act III of 1874. The property remains vatan, though service may not be demanded. It may be alienated without sanction if the settlement confers that power, but the property continues to be vatan property, and as such section 2 of Act V of 1886 applies.

The argument based on a supposed breach of faith appears to be without force. The power of the Legislature to alter certain rules of succession cannot be questioned, and in this case the change was made to give effect to a general wish which was not confined to Hindus only. If the vatan passes by alienations to other sections of the community, they will be bound by section 2 equally with Hindus. The new section has been held as a matter of fact to apply to Mahomedans—*Rahim Khan* v. *Fatu Bibi*.[3]

Mr. Gokuldas further tried to argue that the respondents cannot be said to have claimed through a female within the meaning of section 2 as they succeeded as heirs to their grandfather. This seems to us to be a distinction without a difference, and we must therefore overrule this objection also. We must decide this point against the respondents and in appellants' favour.

*Appeal allowed.*

(1) (1895) P. J. p 371.

## APPELLATE CIVIL.

*Before Mr. Justice Candy, on reference from Mr. Justice Tyabji and Mr. Justice Whitworth.*

1901. *January 7.*

MANCHARAM (ORIGINAL DECREE-HOLDER), APPLICANT, *v.* FAKIRCHAND (ORIGINAL OPPONENT), OPPONENT.*

*Civil Procedure Code (Act XIV of 1882), section 331—"Possession"—Constructive possession—Obstruction to possession in execution of decree—Construction.*

The word "possession" as used in section 331 of the Civil Procedure Code (Act XIV of 1882) is not limited to actual physical possession. It includes also constructive possession, such as possession by a tenant. So held by Candy and Tyabji, JJ., Whitworth, J. dissenting.

Where premises sought to be recovered in execution are in the occupation of tenants and the landlord of such tenants obstructs the officer executing the decree, the claim of such landlord may be investigated under section 331 of the Civil Procedure Code.

APPLICATION under section 622 of the Civil Procedure Code (Act XIV of 1882).

Mancharam Jaychand obtained a decree for possession of a certain shop against the tenants in occupation. On proceeding to execute this decree, he was obstructed by his brother Fakirchand and he thereupon applied to the Court under section 328 of the Civil Procedure Code (Act XIV of 1882) to have the obstruction removed.

Fakirchand alleged that the shop was joint family property in which he had an equal interest with his brother Mancharam, and that the tenants against whom Mancharam had obtained the decree were the common tenants of both. He therefore contended that Mancharam was not entitled to recover sole possession in execution.

The Subordinate Judge held that section 331 of the Civil Procedure Code applied, and he directed that Fakirchand's claim should be numbered and registered as a suit between Mancharam as plaintiff and Fakirchand as defendant under that section (331).

Against this order Mancharam applied to the High Court

*Application under Extraordinary Jurisdiction No. 170 of 1900.

under its extraordinary jurisdiction, contending that section 331 did not apply and that the order made under it was wrong, that the section only applied where the obstruction was caused by a person actually in possession and that Fakirchand was admittedly not in such possession.

A rule *nisi* was granted calling on Fakirchand to show cause why the order of the Subordinate Judge should not be set aside.

The rule came on for hearing in the first instance before a Division Bench (Tyabji and Whitworth, JJ.).

*G. S. Rao* for applicant in support of the rule:—Section 331 does not apply where the person who offers resistance to the execution of the decree is not himself in actual physical possession of the property awarded by the decree. Sections 328, 329, 330 and 332 support this construction. Fakirchand *claims* to be put into possession of the shop in dispute, but he *is* not now in possession. Section 331 contemplates the case of a person who alleges that he is in possession and not of one who merely *claims* possession. The order is wrong as the section does not apply—*Rakhal Churn Mundul* v. *Watson & Co.*[1]

*H. C. Coyaji* for opponent showed cause:—Mancharam and Fakirchand are undivided Hindu brothers. The tenants of the shop who were the defendants in the suit are the tenants of both. Fakirchand is their landlord as well as Mancharam. Mancharam sued and obtained a decree without making Fakirchand a party. But he could not in that way deprive Fakirchand of his rights as landlord. Fakirchand is in constructive possession through his tenants.

The word "possession" in section 331 does not mean merely actual physical possession. It includes constructive possession. It is more comprehensive than the corresponding sections in previous Codes. Compare section 331 of Act X of 1877 and section 229 of Act VIII of 1859—*Moulakhan* v. *Gorikhan*,[2] *Bapujirao* v. *Fatesing*,[3] *Govinda* v. *Kesava*,[4] *Chinnasami* v. *Krishna*.[5]

(1) (1883) 10 Cal. 50.
(2) (1890) 14 Bom. 627.
(3) (1896) 22 Bom. 967.
(4) (1880) 3 Mad. 81.
(5) (1881) 3 Mad. 104.

1900.

MANCHARAM v. FAKIRCHAND.

TYABJI, J.:—The only question in this case argued before us was whether the word "possession" in sections 328 and 331 of the Civil Procedure Code ought to be confined to actual physical possession as contradistinguished from constructive or symbolical possession.

The facts of the case are extremely simple. It appears that the petitioner obtained a decree for possession of a shop against Lilabhai Dayabhai and Chagoobhai Dayabhai. In execution of the decree the petitioner was obstructed in obtaining possession by the opponent Fakirchand Jaichand. The petitioner thereupon complained to the Court and prayed for the removal of the obstruction under section 328. On inquiring into the matter the Court framed the following issues, namely: Is the opponent in possession of the disputed property? If so, is he so *bona fide* and on his own account?—and it found that the opponent claimed possession *bona fide* on his own account, and ordered the claim of the petitioner to be registered as a suit under section 331 of the Civil Procedure Code.

Against this last mentioned order the petitioner has applied under the extraordinary jurisdiction of this Court, contending that the order of the Subordinate Judge was wrong, inasmuch as the opponent was not in actual physical possession of the shop, but merely claimed constructive possession through the judgment-debtors. As there appears to be no express reported decision on the point, and as the matter appeared to us of some importance, we took time to consider our judgment.

Having now fully considered the provisions of sections 328—332, I see no sufficient ground to interfere with the order of the Subordinate Judge. I can see nothing in those sections to limit the word "possession" to actual physical possession. Possession of immoveable property is not the less real or actual because it is enjoyed through tenants, servants or members of one's family. Indeed, actual physical possession can exist in but very few cases and that too to a very limited extent even in regard to a small piece of land. Can it be argued that a man is not in possession of a house and garden because he occupies only a small room, the rest being in the occupation of his servants and members of his family? Can it be said that the owner of a

bungalow at Mátherán or Mahábaleshwar is not in possession of that bungalow simply because he lives in Bombay, leaving the property generally in charge of his malee? Again, is not a man in possession of a house if the actual occupant is his tenant, who recognizes his title and pays him rent? It seems to me that we should be doing great injustice if we held that the servants or tenants or members of the owner's family may be dispossessed in execution of a decree to which he was no party, without his being entitled to come in under section 331 and having his claim investigated under the provisions of that section. No case has been cited to us in support of such a contention, and on the contrary I think that the cases of *Moulakhan* v. *Gorikhan*(1) and *Bapaji Rav* v. *Fatesing*(2) support the contrary view. If the contention of the petitioner were correct, the Court would be bound to reject the claim of the objector as soon as it was found that he was not in actual physical possession; but we find it distinctly laid down in section 331 that this is not so and that the enquiry under that section is not to be confined to the question of mere physical possession, but is much wider in its scope. This is inconsistent with the petitioner's contention, for otherwise we should have to hold that a party may illegally get a claim registered as a suit under the false pretence that he was in actual possession and may yet legally support it afterwards, not by possession, but by title. This anomaly is partly or wholly avoided by holding that "possession" in these sections has the wider general meaning, and that it includes constructive and symbolical possession quite as much as actual physical possession. Moreover, a decree for possession is not necessarily passed against a person in actual physical possession of the property. It is often passed against a person who is only in possession through his tenants. How is such decree to be executed, unless the word "possession" includes both physical as well as symbolical possession?

For these reasons I would not interfere with the order of the Subordinate Judge and would dismiss the application with costs; but as my learned colleague Mr. Justice Whitworth takes a

(1) (1890) 14 Bom. 627. (2) (1896) 22 Bom. 967.

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different view, I think it better that the question should be referred to a third Judge under section 575 of the Civil Procedure Code.

WHITWORTH, J.—The only question in this case is whether the word "possession" in section 331 of the Civil Procedure Code is limited to actual physical possession or extends to the possession of a landlord through his tenants. I think the limited construction is the correct one.

In the first place the provision of law in question is one relating only to the execution of decrees, and a Court executing a decree is concerned only with the parties to the suit and others who may be found in actual and visible possession of the land in dispute.

Secondly, the section itself contemplates that in such a case as the present, it is the tenant and not the landlord whose claim to be in possession is to be recognized. For it uses the words "claiming in good faith to be in possession of the property on his own account or on account of some person other than &c.," and not any such expression as "claiming in good faith to be in possession himself or through some person other than &c."

Thirdly, to hold that a person not in actual possession of the land may avail himself of the provision of section 331 would, I think, work injustice: for it would place a claimant in the favourable position of defendant, when according to ordinary principles of law he ought to be in the position of plaintiff and be bound to prove his title. A person claiming in good faith to be landlord in respect of certain land often has to sue to obtain possession of it; but according to the construction sought to be put upon section 331 in this case, such a person would, in the event of a decree being obtained against the person he alleges to be his tenant, merely have to defend his title and not prove it. The *onus* would be on the decree-holder to show that his title was better than the claimants.

The cases of *Moulakhan* v. *Gorikhan*(1) and *Bapujirav* v. *Fatesing*(2) have been cited in support of the claimant's conten-

(1) (1890) 14 Bom. 627.

(2) (1896) 22 Bom. 967.

tion. But those cases go no further than to establish that when a case has been registered as a suit under section 331, the whole question of title comes under trial. That, no doubt, is the law since the amendment in 1879 of the corresponding section of the earlier Code. But the question here is not as to the scope of the trial, but whether the case was one to be registered as a suit under section 331 at all. Substantially the question is whether the claimant is to be the plaintiff or defendant in the issue between him and the decree-holder. If the plaintiff's claim was rightly registered as a suit under section 331, then the claimant—the inconvenience of the phraseology is pointed out in *Mahabir Prasad* v. *Parma*[1]—will be defendant; if not, he must bring a suit to establish his claim.

I consider that the possession claimed by the opponent is not such possession as is contemplated by section 331 of the Civil Procedure Code, and would make the rule absolute with costs.

The case was then referred to Candy, J., under section 575 of the Civil Procedure Code (XIV of 1882), before whom it was re-argued.

*Gunpat Sadashiv Rao* for the applicant.

*H. C. Coyaji* for the opponent.

CANDY, J.:—I have heard this application under sections 575, 647, of the Civil Procedure Code. I may remark that no point was taken in the argument before me with reference to the explanation added to section 647 by Act VI of 1892. That explanation is that section 647 does not apply to applications for the execution of decrees, which are proceedings in suits.

The present dispute has arisen with regard to a point of law in reference to section 331 of the Civil Procedure Code, which is to be found in Chapter XIX—Of the execution of Decrees. Section 575 applies to a difference of opinion on a point of law between two Judges composing a Bench which hears an appeal. Section 622 (under which the present application was made to this Court) refers to cases in which no appeal lies to this Court. Section 647 provides that the procedure herein prescribed shall be follow-

(1) (1892) 14 All. 417.

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ed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction other than suits and appeals. Having regard to the explanation to section 647 above quoted, it is questionable whether section 575 is applicable. It would appear under section 36 of the Letters Patent that the proper procedure would be for the opinion of the senior Judge to prevail.

The point in dispute arose in the following manner. The petitioner to this Court, Mancharam, obtained as plaintiff a decree for possession of a certain shop against his tenants, his defendants Lilabhai and Chaganbhai, sons of Dahyabhai.

In execution of that decree Mancharam was obstructed by his brother Fakirchand *alias* Manekchand. Mancharam complained to the Court under section 328.

The Subordinate Judge summoned Fakirchand. On 16th June, 1900, the Subordinate Judge framed the issue—Is the opponent Fakirchand in possession of the disputed property? If so, is he so *bona fide* and on his own account?

On the same day the Subordinate Judge at the instance of the opponent's pleader framed the following additional issue—Whether without going into the inquiry regarding the first issue, the application of the applicant should be registered as a suit?

On the 30th June, 1900, the Subordinate Judge examined the opponent, Fakirchand *alias* Manekchand, who deposed that the shop, the subject of Mancharam's decree, was the joint property of himself and his brother Mancharam; that the rent-note on which Mancharam had obtained the decree for possession against the tenants was passed in Samvat 1923 (A.D. 1867) when he (Fakirchand) was a minor, and that he and his brother Mancharam, and their mother, jointly took the rent of the property. He added: "I claim possession on my behalf and not on behalf of the judgment-debtor." The Subordinate Judge thereupon proceeded to pass the following order:

"On examining the opponent I find that he claims possession *bona fide* on his own account. I therefore decide the first point in the affirmative. As to the second I also find that unless the Court is satisfied that the opponent's application is *bona fide* it cannot be registered as a suit.

"I therefore order the claim of the decree-holder to be registered as a suit under section 331 of the Civil Procedure Code."

Against that order the plaintiff Mancharam filed the present application under section 622, mainly on the ground that the opponent Fakirchand having admitted that the shop in dispute is in the actual possession of the judgment-debtors, and not in his own possession, section 331 does not apply.

This was the point on which the learned Judges who heard the application differed.

Mr. Justice Tyabji held that there was nothing in sections 328—332 to limit the word "possession" to actual physical possession, and therefore he was in favour of not interfering with the order of the Subordinate Judge. Mr. Justice Whitworth held that the word "possession" in section 331 is limited to actual physical possession and does not extend to the possession of a landlord exercised through his tenants.

In deciding the above question as regards its applicability to the present case it is necessary to bear in mind the facts of the case. It is clear that the opponent Fakirchand claims to be jointly interested with the landlord decree-holder-plaintiff in the lease of the shop to the tenant-defendants, though he was not, owing to his minority, a party to the rent-note on which the landlord obtained a decree in ejectment against the tenants. Can he in such a decree for ejectment claim to intervene in execution, so that this title as joint-owner with his brother may be investigated, and if he is successful the Subordinate Judge may put him into joint possession with his brother? That is the utmost that he can claim, if successful, for his allegation is that he and his brother (and their mother) were jointly receiving the rent. Or should the Subordinate Judge have refused to register the claim as a suit, leaving opponent to establish his rights as joint-owner with the plaintiff in a separate suit against his brother either for partition or for such other relief as would safeguard his alleged rights as joint-owner of the shop?

Sections 328—335 of the Civil Procedure Code come under head H—Of resistance to execution—in Chapter XIX. Section 328 provides that if the Court's officer is resisted or obstructed by any person the decree-holder may complain. There is no indication in that section as to the nature of the resistance or obstruction, but clearly there must be some overt act of opposition

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to the Court's officer on the part of some one who is actually present. Sections 329 or 330 refer to cases in which the Court is satisfied that such obstruction or resistance was occasioned by the judgment-debtor or by some person at his instigation. It is not contended that such was the case here. Plaintiff in his affidavit alleged that opponent unsuccessfully tried to intervene in the suit, and opponent in his deposition before the Subordinate Judge alleged that the defendants in the suit contended that he (opponent) should be made a party; but apparently the Subordinate Judge who tried the suit refused to allow this to be done, as opponent was not a party to the rent-note on which plaintiff claimed to eject the defendant-tenants. Opponent was apparently fighting for his own hand, and not at the instigation of the tenants of the shop. Sections 329-330 were therefore not applicable. Was section 331 applicable? Does the opponent claim to be in possession of the shop on his own account or on account of some person other than the judgment-debtor? At first sight this should apparently be answered in the negative. What he claims is that the tenants had been in possession on the account jointly of himself and the nominal landlord in whose name the rent-note had been passed. The words of the section allow the obstructor to say: "I am in possession on my own account or on account of some person other than the judgment-debtor." But they do not apparently allow him to say: "The judgment-debtor is in possession on my account, or jointly on my account and on account of the decree-holder, and therefore my claim must be registered as a suit between the decree-holder as plaintiff and me as defendant." Sections 329, 330 and 331 do not appear to be exhaustive, so that if the case does not fall within sections 329-330, then the obstructor's claim must be investigated under section 331, whatever may be the nature of his interest claimed in the property in dispute. How far, then, do the decided cases bear out this view?

In *Moulakhan* v. *Gorikhan*,[1] Birdwood, J., pointed out the change which had been made in the Code of 1877, section 331, by the amending Act XII of 1879, the provisions of which are

(1) (1890) 14 Bom. 627.

re-enacted in the present Civil Procedure Code. "The intention of the Legislature in so altering the section was clearly to enlarge the powers of the Courts in the investigation of claims under section 331. Any question of title arising between the contending parties in connection with their right of possession may now be finally determined in such investigation as in an ordinary action on ejectment. The order made under section 331, whether for executing or staying execution, has now the force of a decree determining the title and the right of possession, and it is not intended that the plaintiff should be forced to a fresh suit, or should have the right to bring a fresh suit, if the decree is against him." Jardine, J., took the same view, and held that whatever the law may have been when the Code of 1877 was in force, the Code of 1882 shows that the investigation is not now to be confined to possession.

The above ruling was approved of in the subsequent case (1896) of *Bapujirao* v. *Fatesing*[1] in which plaintiff had obtained a decree for possession of certain land against his tenant Bayaji. On proceeding to execute his decree he was resisted by the defendants, who alleged that they were entitled to the land as the nearest heirs of the last owner, one Jotyaji. It does not appear that they claimed to have been in possession since the death of Jotyaji, either themselves or through their tenants. Plaintiff complained of the defendants' obstruction, and his application was registered as a suit under section 331. On investigation the Subordinate Judge dismissed the suit, holding that the plaintiff's title was not proved, but on appeal to the District Court, the Assistant Judge held that the plaintiff was in possession of the land as against the defendants, and that they had failed to prove a better title than the plaintiff. This view was affirmed in second appeal by the High Court.

As I was a party to the judgment I may remark that in my opinion the first paragraph of the judgment requires to be more accurately stated. It is there remarked that the possession of the plaintiff through his tenant Bayaji was "for the purpose of section 331, Civil Procedure Code, as good as actual possession

[1] (1896) 22 Bom. 967.

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—*Bhyrub Sircar* v. *Sham Manjee*[1]." What was decided in the Calcutta case, just quoted, was that possession by receipt and enjoyment of rent is as good in law as actual occupation, and there is no reason to hold that the provisions of section 230 apply to those cases only in which the party seeking for relief under that section was in personal occupation. Now section 230 of Act VIII of 1859 refers to cases in which a person other than the defendant dispossessed in execution, disputes the right of the decree-holder to dispossess him, on the ground that the property was *bona fide* in his possession on his own account or on account of some other person than the defendant, and that if included in the decree he was not a party to the suit. If in such a case it appeared to the Court that there was probable cause for making the application, it was to be numbered and registered as a suit between the applicant as plaintiff and the decree-holder as defendant, just as if a suit for the property had been instituted by the applicant against the decree-holder. The provisions of the above section 230 of Act VIII of 1859 are now to be found in section 332 (not 331) of the present Code, the procedure of the intervening Code of 1877 being similar, except that the suit between the applicant as plaintiff and the decree-holder as defendant was to be as if a suit had been instituted under section 9 of the Specific Relief Act of 1877 ; while now under section 332 of the present Code, instead of the claim of the applicant being investigated as if it was a suit, the Court, if it finds that the ground mentioned in the first paragraph of the section exists (possession of the applicant on his own account or on account of some person other than the judgment-debtor), it shall make an order that the applicant recover possession of the property, and if it does not find as aforesaid, it shall dismiss the application. There are two important provisions to this section 332; first, that in hearing applications under this section the Court shall confine itself to the grounds of dispute above specified; *i.e. bona fide* possession on his own account &c. (this was inserted for the first time in the Code of 1877 when the suit was to be as one instituted under section 9 of the Specific Relief Act); secondly, that the

(1) (1871) 15 W. R. 70.

person against whom an order is passed under this section may institute a suit to establish the right which he claims to the present possession of the property. A similar provision is to be found in section 335, which relates to cases in which the purchaser of any immoveable property sold in execution of a decree is resisted by, or dispossesses any person other than the judgment-debtor claiming in good faith a right to the *present possession* thereof; the Court is to pass such order as it thinks fit, and the person against whom such order is passed may institute a suit to establish a right which he claims to the *present possession* of the property.

The above considerations lead to the conclusion that although the decision in *Bhyrub Sircar* v. *Sham Manjee* [1] may have been correct in regard to the provision of section 230 of Act VIII of 1859, according to which the matter in dispute was to be investigated in the same manner as if a suit for the property had been instituted by the applicant against the decree-holder, the same ruling does not necessarily hold good with regard to section 332 or 335 of the present Code, in which the investigation is not as if a suit had been instituted and the right claimed is confined to the right to present possession.

But when we come to consider the provision of section 331 of the present Code (answering to section 229 of Act VIII of 1859) the case is different. We find that the claim is to be investigated as if a regular suit were instituted by the decree-holder against the claimant. Act XII of 1879 cancelled the provisions of Act X of 1877 as regards this section also; and the law reverted to what it was under section 229 of Act VIII of 1859. But if (to apply the words of Birdwood, J., above quoted) any question of title arising between the contending parties in connection with their right of possession is to be determined in the suit under section 331, then here Fakirchand may fairly claim that if the tenants under the rent-note are to be ejected, plaintiff should not obtain sole possession, but should be put into joint possession with him (Fakirchand). This was the view taken in *Bapujirao* v. *Fatesing* (*supra*). The issue sent down by the Chief Justice and myself

(1) (1871) 15 Cal. W. R. 70.

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was not, Are the claimants (the defendants) in present possession of the property ? but, "Are the defendants entitled to succeed to Jotyaji's property ?" No doubt, as pointed out by Mr. Justice Whitworth, the two rulings of this Court, quoted above, cannot be said to directly establish more than that when a case has been registered under section 331, the whole question of title comes under trial, while the question here is not as to the scope of the trial, but whether the case was one to be registered as a suit under section 331 at all. But if on the face of the provisions of section 331 the claimant in the two Bombay cases had no right to intervene at all, the point would hardly have been overlooked by the Judges who decided those cases. It was obviously present to our minds in the later of the two cases, though, as shown above, the proposition in the first paragraph of the judgment is not accurately stated.

Another point alluded to by Mr. Justice Whitworth is that of *onus*. Under section 331 the decree-holder is plaintiff, on whom the burden of proof would naturally lie. This point was discussed in 1883 in the case of *Rakhal Churn* v. *Watson and Company*[1] with reference to the corresponding section 229 in Act VIII of 1859. Garth, C.J., said (pages 54-55) :

"Whether the claimant really had or was entitled to the possession which he claimed under section 229 was a question to be tried in this suit ; and the plaintiffs, as I consider, fulfilled *prima facie* the *onus* which the law casts upon them, when they proved that the judgment-debtor, whose rights they had acquired, held possession as against the claimant at the time when the latter made his claim.

If this was not so, section 229 would be productive of the greatest injustice. A man who holds possession of property has a right to retain possession until some other person can show a better right to it. But if a man who merely claims possession under section 229, without in fact being in possession, is to be entitled in law to possession as against the actual possessor, unless the latter proves his title, the consequences would be serious indeed. A claimant under that section, although he had no possession, would then be in a better position than the actual possessor.

The section may often operate unjustly enough against the decree-holder as it is ; but the injustice would be far greater if the appellant were right in his contention."

(1) (1883) 10 Cal. 50.

It is clear from the above judgment that it was taken for granted that a claimant under section 229 need not be in actual personal occupation when he makes his claim and becomes defendant in the suit, just as was held in *Bhyrub Sircar* v. *Sham Manjee*,[1] when he makes his claim under section 230 and becomes plaintiff in the suit.

To apply those principles to the present case: the claimant (the present opponent) asserts that if the tenants are ejected, then he is entitled to joint possession with his brother (the plaintiff). The plaintiff has fulfilled *prima facie* the *onus* which the law casts upon him, when he shows that the rent-note was passed to him alone and that he alone has obtained a decree in ejectment on that rent-note. The *onus* is thus shifted on to the claimant to prove what he asserts, that he was interested in the rent-note and received jointly with the plaintiff the rent, and is thus now entitled on the tenants being ejected to joint possession with the plaintiff. The fears as to the plaintiff-decree-holder being put in an unfair position would appear to be groundless.

There is another case (of 1880), *Govinda Naik* v. *Kesava*,[2] in which the lands in dispute were in the possession of the first defendant's tenants who were bound by the decree. In execution of the decree the Court officer was obstructed by Kesava, the brother of the first defendant, who claimed as a member of a 'tarwad' of which the first defendant was 'karnavan.' Kesava was not in actual personal occupation, but the plaintiff having obtained an ejectment decree against Kesava's co-sharer and also the tenants of that co-sharer, Kesava, on account of his joint interest with the first defendant, claimed to intervene in execution under section 331 (as modified by Act XII of 1879 ?). It was held that he could do so. "Whether such claim is valid or not, and whether he should have obstructed or not, there appears to have existed a claim which required the Munsiff to number and register the application of the plaintiff as a suit between plaintiff and Kesava" under section 331. It was suggested in the above case that the claim of Kesava was not in good faith under section 331 by reason of his interest in the lands in dispute being joint with the first defendant. But their Lordships held:

(1) (1871) 15 Cal. W. R. 70.

(2) (1880) 3 Mad. 81.

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"It seems to us that if Kesava had any interest in the lands C, either as a member of the family or otherwise, which would be affected if plaintiff got possession of C, and if he was in possession in such case, Kesava in respect of his own interest (though joint with the defendant) would claim to be in possession of the property on his own account within section 331. His joint interest with the defendant could not prevent him from claiming in good faith in respect of his own interest."

In a similar case under section 332—*Cooverji Hirji* v. *Dewsey Bhoja*[1]—Starling, J., held (in 1893) that the claimants who claimed to be in joint possession of the property in dispute with their father, the judgment-debtor, could not be said to be in possession of the land of which they were dispossessed *on their own account* within the meaning of section 332. Reference was apparently not made to the Madras decision above noted.

In 1873 Glover, J., held in *Asgur Ali* v. *Asgur Ali*[2] that possession through a mortgagee (who was in actual possession) was sufficient possession for the purpose of the mortgagor bringing a claim under section 230, Act VIII of 1859 (corresponding with section 332 of the present Civil Procedure Code).

So too in 1874 in *Banee Madhub Dutt* v. *Nund Lall Mojoomdar*,[3] in which it was stated that the person actually in possession was a tenant of the claimant, Markby, J., said: "I cannot lay down as an absolute rule, without restriction, that a person who has parted with the actual occupation of the land to another might not take the advantage of section 230 (Act VIII of 1859). It is quite obvious ..... that there are many cases where it would be extremely inconvenient if the parties could not do so."

There is thus a current of decisions in favour of the view that the words "claiming to be in possession on his own account of some person other than the judgment-debtor" may be taken as including a person who is not in personal occupation of the land but who claims to be in possession through the person who is in actual possession. Possession by a gardener or a servant is of course the possession of the owner (*cf.* the remarks of Sir C.

(1) (1893) 17 Bom. 718. (2) (1873) 20 Cal. W. R. 373.
(3) (1874) 22 Cal. W. R. 123.

Sargent in *Goma* v. *Narsingrao*[1] and see Addison on Tort, 7th Edn., page 264). But possession by a tenant is different : where the alleged tenant is a third party and not the judgment-debtor, and where he is said to be in possession as the tenant of a landlord, who is also not a party to the suit, then the obstruction to the Court's officer would naturally and probably be made by the tenant who is on the spot, and he would then be the person who would be summoned under section 328, and who would be the claimant under section 331 claiming to be in possession on account of his landlord who is other than the judgment-debtor. When such a claim is registered as a suit the person alleged to be the landlord will naturally be joined as a party, and the dispute will then be thoroughly investigated. But where the tenant is the judgment-debtor, and is thus debarred from making a claim under section 331, and the third party who claims to be the landlord of the tenant in possession actually obstructs the Court's officer, then the current of decisions is in favour of the view that such third party is entitled to intervene under section 331.

In this view of the law I do not think that this Court would be justified in the exercise of its extraordinary jurisdiction in interfering with the Subordinate Judge's order or in holding that the Subordinate Judge was exercising a jurisdiction not vested in him by law, when he registered Fakirchand's claim as a suit, in which the decree-holder was to be plaintiff and Fakirchand defendant. At the most it was possibly an error of procedure. In any event the dispute will have to be fought out between plaintiff and Fakirchand. The only effect of the Subordinate Judge's order is that there will not be a fresh suit with a fresh institution fee, and plaintiff will remain in his position as plaintiff ; but as pointed out above, he will not be injured thereby in regard to the question of onus.

The rule is therefore discharged with costs. If my doubts as to such a case being referable to a third Judge are correct, and my remarks on the merits thus become mere *obiter dicta*, the result will be the same.

*Rule discharged.*

(1) (1895) 20 Bom. 260 at p. 264.

## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.*

1901.
*June* 24.

GOVIND ABAJI JAKHADI, APPLICANT, *v.* MOHONIRAJ VINAYAK JAKHADI, OPPONENT.*

*Civil Procedure Code (XIV of 1882), section 295—Rateable distribution under several decrees—Decrees must be against same judgment-debtor—Decree against judgment-debtor—Subsequent decree against his legal representative and his estate.*

Mohoniraj obtained a money decree against one Bhau Babaji, who died shortly afterwards. His son Kashinath, as his legal representative, was then placed on the record and the property of the deceased judgment-debtor Bhau Babaji was then attached and sold in execution. Meantime the applicant, Govind Abaji, had obtained a decree against "Bhau Babaji, deceased, by his son Kashinath and against the estate of Bhau Babaji, deceased"; and he applied under section 295 of the Civil Procedure Code (XIV of 1882) to share rateably in the proceeds of the sale held in execution of the other decree.

*Held*, that the application should be refused. Under section 295 the money decrees in respect of which rateable distribution is given must be against the same judgment-debtor. In this case one decree was against Bhau Babaji and the other against his son Kashinath. The fact that the latter decree was expressed to be made against "Bhau Babaji, deceased, by his son Kashinath," made no difference. One decree was against Bhau Babaji himself: the other was against his legal representative.

The fact that the second decree was also "against the deceased's estate" did not make Bhau Babaji a judgment-debtor under that decree in a suit commenced after his death.

The practice hitherto prevailing in the mofussil of making a dead man "by his heir" a party to a suit is erroneous and should be discontinued.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882,) against the order of Ráo Sáheb G. L. Chandorkar, Subordinate Judge of Sinnar, in the Násik District, in darkhást No. 1368 of 1900, in execution of a money decree in suit No. 878 of 1899.

On the 20th January, 1899, one Mohoniraj Vinayak Jakhadi obtained a money decree against Bhau Babaji Jangam in the Court of the Second Class Subordinate Judge of Sinnar. Bhau Babaji Jangam died shortly after the decree and the name of his son and legal representative, Kashinath, was brought on the record,

* Application No. 52 of 1901 under Extraordinary Jurisdiction.

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and Mohoniraj then applied for execution of his decree, and the deceased judgment-debtor's property was accordingly attached and sold in execution.

In the meantime, *viz.* on the 18th June, 1900, the applicant, Govind Abaji Jakhadi, obtained a money decree in the same Court against "Bhau Babaji, deceased, by his son and heir Kashinath, a minor, by his guardian the Nazir" and against the deceased's estate, and he then applied under section 295 of the Civil Procedure Code (XIV of 1882) for a rateable distribution of the proceeds realised by the sale of the property in execution of Mohoniraj's decree.

The Judge rejected the application on the ground that the applicant's decree was not against the same judgment-debtor as the decree obtained by Mohoniraj.

The applicant then applied to the High Court under its extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882,) and obtained a rule *nisi* requiring Mohoniraj Vinayak Jakhadi to show cause why the order of the Judge should not be set aside.

*Mahadeo B. Chaubal* for the applicant in support of the rule:—The Court below was wrong in holding that the decrees are against different defendants. They were both passed against Bhau Babaji Jangam. In our suit it is true he is represented by his son and heir Kashinath, but it is Bhau Babaji who was sued, and it is against him and his property the decree was made and is now to be executed. We can apply independently for execution against Bhau Babaji's property. If so, we can surely claim rateable distribution. The rulings in *Deboki Nundun* v. *Hart*[1] and *Chattrapat Singh* v. *Judukul Prosad*,[2] show that regard should be had to the property sought to be sold. *Hart* v. *Tara Prasanna*[3] is, we submit, in our favour. The decision in *Nimbaji Tulsiram* v. *Vadia Venkati*[4] shows that the fact that one of the decrees is against two defendants is immaterial.

There was no appearance for the opponent.

(1) (1885) 12 Cal. 294.
(2) (1892) 20 Cal. 673.
(3) (1885) 11 Cal. 718 at p. 728.
(4) (1892) 16 Bom. 683.

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JENKINS, C.J.:—In my opinion no case is made for a rateable distribution under section 295 of the Civil Procedure Code. It is useless to speculate as to any other test than that which the section itself provides, and that test is stated in the plainest terms. So far as the present case goes, it is enough to say that the money decrees must be against the *same* judgment-debtor. Here, however, one decree is against Bhau Babaji Jangam and the other is against his son Kashinath.

It is true that the second decree is expressed to be against "Bhau Babaji Jangam, deceased, by his son Kashinath": but this incorrect mode of expression can make no difference. It is due to the erroneous practice which prevails in the mofussil Courts of this Presidency, according to which a dead man is expressed to be a party to a suit by his heir. A circular has recently been sent to the several Courts drawing attention to this matter, and requesting amendment, so that I hope the practice has now become a thing of the past. It is so obvious that one hesitates to make the remark, but it is the fact that a dead man cannot be a party to a suit. It cannot too, in this case, make any difference that the decree is expressed further to be "against the deceased's estate": that does not make Bhau a judgment-debtor in respect of a decree in a suit commenced after his death. The interpretation of "judgment-debtor" in section 2 and the phraseology of section 234 of the Civil Procedure Code leave no doubt on the point. The rule must therefore be discharged.

CHANDAVARKAR, J.:—I am also of opinion that section 295 of the Code of Civil Procedure has no application to the facts of the present case.

Those facts are:—In suit No. 1195 of 1899 one Mohoniraj Vinayak Jakhadi obtained a money decree against Bhau Babaji Jangam in the Subordinate Judge's Court at Sinnar. The judgment-debtor, Bhau Babaji Jangam, having died after the decree, the decree-holder Mohiniraj presented a *darkhást* for execution after bringing on the record Bhau's son and heir Kashinath as his legal representative. The deceased judgment-debtor's property was then attached.

The present applicant thereupon applied to the Court for rateable distribution under section 295, as he held a decree

obtained against Bhau Babaji Jangam, deceased, by his son Kashinath and against the deceased's estate.

Section 295 requires that the decrees in respect of which rateable distribution has to be made must be decrees against the same judgment-debtor. "Judgment-debtor," as defined in the Civil Procedure Code, means "any person against whom a decree or order has been made." The decree obtained by the present applicant is against Bhau Babaji Jangam, deceased, by his son and heir Kashinath. Can it be said to be a decree against Bhau Babaji? It is a decree passed against Bhau's legal representative, whereas the decree obtained by the opponent Mohoniraj was against Bhau himself. It cannot be said, therefore, looking to the names of the parties, that the two decrees are against the same judgment-debtor. It is true that the estate that is liable in the case of both the decrees is the estate of the deceased Bhau, but section 295 does not make the nature of the liability under the decrees contemplated by it one of the essential conditions for the application of the section.

If, again, we consider the question by the light of other sections in the Code, which relate to a legal representative, we arrive at the same result as that indicated by the definition of the term "judgment-debtor," showing that a decree obtained against A while he is alive and a decree against B after A's death, as A's legal representative, are not against one and the same judgment-debtor. Section 234 provides for the execution of a decree where that execution is sought after the judgment-debtor's death. It is the deceased in that case who is, according to the terms of that section, the "judgment-debtor." Where, on the other hand, a person is sued from the beginning as the legal representative of a deceased person, the person so sued is the defendant, and, according to section 50 of the Code, the plaint must show that he is interested in the subject-matter of the claim and that he is liable to be called upon to answer the plaintiff's demand as the legal representative of the deceased. In such a case, if the person sued is the legal representative as alleged, a decree must be passed against him as such representative where the liability of the deceased is proved, whether he (the representative) has assets or not belonging to the deceased the

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question of his liability to the extent of the assets that have or could have come into his hands being left to be determined in execution—*Girdharlal* v. *Bai Shiv*.[1] In other words, the decree is passed against him, and he is therefore the "judgment-debtor."

The result is the same where the legal representative of a defendant is brought on the record in the event of the defendant dying in a pending suit. In that case section 368 provides that "the case shall thereupon proceed in the same manner as if such representative had originally been made a defendant and had been a party to the former proceedings in the suit." Where, however, a defendant dies after a decree has been made against him, his legal representative "may"—not "must" as in the other case—be brought on the record, and he can in that event be brought on the record under a different section, *i.e.* section 234 of the Code, which does not say that after he has been brought on the record he shall be proceeded against as if he had been originally a defendant. He is, according to the section, simply the legal representative of the deceased, but it is the deceased who is the "judgment-debtor." It is true that he becomes a "judgment-debtor" within the definition of that term when an order is passed against him in execution proceedings, but that does not entitle his judgment-creditor to claim rateable distribution under section 295, for the terms of that section require that "the decrees"—not "orders"—should be against the same "judgment-debtor."

Applying these considerations to this case before us, it is obvious that the decree obtained by the present applicant was against Bhau's son and heir, Kashinath, who must be regarded as his "judgment-debtor," whereas the decree obtained by the opponent was against Bhau as his judgment-debtor. The opponent by bringing Kashinath as the legal representative of Bhau on the record in his execution proceedings and obtaining an *order* for execution as against Kashinath as such representative, has no doubt made him his "judgment-debtor," according to the definition of that term in the Code. But though that order obtained by the opponent and the decree obtained by the present applicant are against the same "judgment-debtor" (*i.e.* Kashinath), yet the decree of the former is against Bhau, whereas

(1) (1884) 8 Bom. 309.

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the decree of the latter is against Kashinath, and it is the decrees and not the orders passed in execution which form the test for a rateable distribution under section 295 of the Code. The present application must therefore fail. I agree, for these reasons, in holding that the rule must be discharged.

*Rule discharged.*

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## ORIGINAL CIVIL.

*Before Mr. Justice Russell.*

1900.
*October* 4.

MOWJI SHAMJI AND OTHERS (PLAINTIFFS), *v.* NATIONAL BANK OF INDIA, DEFENDANTS.*

*Bank — Banker and customer — Pass-book — Cheque lodged by customer for collection — Effect of entry in customer's pass-book of such cheque as if collected — Estoppel.*

Early in March, 1900, the Hope Mills Company purchased 600 bales of cotton from the plaintiff at Rs. 278 per *candy*, but, being unable to accept and pay for them, it was arranged between the Company and the plaintiffs that one Shridhan should take them over from the plaintiffs at Rs. 243-8-0 per *candy* (the price having fallen in the meantime) and that the Company should pay the plaintiffs the difference of price. In fulfilment of this agreement the Company sent to the plaintiffs a cheque for Rs. 9,500 drawn by them on the Commercial Bank, being approximately the amount of the difference. This cheque was given to the plaintiffs on the 23rd March, 1900, but was post-dated the 3rd April. It was sent by the plaintiffs for collection to the defendant Bank (with which the plaintiffs had an account) on the next day (the 4th) at about 12 o'clock together with the plaintiffs' pass-book. The pass-book was asked for by the plaintiffs and was returned to them at about 4-30 o'clock on the same day with the Rs. 9,500 duly credited therein and initialled by one of the Bank's officers. On that same afternoon the plaintiffs delivered 100 of the bales to Shridhan. On the next day (the 5th April) another 100 bales were delivered by the plaintiffs to Shridhan, and after the delivery had proceeded thus far the plaintiffs at about 1-30 o'clock on the 5th April received notice from the defendant Bank that the Company's cheque for Rs. 9,500 had been dishonoured. Subsequently to the receipt of this notice the plaintiffs delivered the remaining 400 bales to Shridhan. The plaintiffs now sued the defendant Bank to recover the sum of Rs. 9,500, alleging that it was impossible to recover the amount from the drawers of the cheque (the Company), and contending that the defendant Bank

* Suit No. 434 of 1900.

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by entering the said amount in the plaintiffs' pass-book and delivering the said book to them had led them to believe that the cheque had been duly honoured and the amount paid into their account, and they alleged that they would not have delivered the said bales to Shridhan if it had not been for the said representation by the Bank. They contended that the Bank was estopped from alleging the dishonour and non-payment of the cheque.

*Held*, that the returning of the pass-book to the plaintiffs by the Bank and the noting and initialling of the entry of Rs. 9,500 therein was a representation by the Bank that it had received payment of the cheque and was prepared to give the plaintiffs' credit for the amount. But

*Held*, upon the evidence that the delivery of the bales by the plaintiffs to Shridhan was not made on the faith of such representation by the Bank.

*Held*, further, that the plaintiffs were not entitled to recover and that the Bank was not estopped by the entry in the pass-book from alleging the non-payment of the cheque. The cheque having been lodged by the plaintiffs for collection on the 4th April, the Bank in the ordinary course of business had until the next day to give notice of its dishonour and the entry in the pass-book made on the 4th was not intended to be an acknowledgment of cash received. The Bank never intended the plaintiffs to act upon the entry in the pass-book made on the 4th upon the faith of its being an entry of cash actually received, and further, the cheque was a post-dated cheque, and the plaintiffs when lodging it clearly had doubts as to whether it would be honoured or not, while the defendant Bank had no knowledge of any circumstance justifying doubts as to its payment. The parties thus did not deal on equal terms and the defendant Bank was therefore not bound by the entry in the pass-book as a receipt—(*Martin* v. *Morgan*[1]).

SUIT to recover Rs. 9,500. The question raised in this case was whether the defendant Bank was bound by an entry made by one of its officers in a customer's pass-book crediting the customer with the amount of a cheque lodged by him with the said Bank for collection from another Bank.

The plaint stated that early in March, 1900, the plaintiffs who were cotton merchants trading under the name of Shamji Ludha & Co., contracted to sell to the Hope Mills Company six hundred bales of cotton at a certain price. The Company, however, failed to carry out the contract, and it was consequently agreed between them and the plaintiffs that the plaintiffs should dispose of the cotton to another buyer at a less price than the Company had agreed to pay under their contract, and that the Company should pay to the plaintiffs the difference between the said prices.

(1) (1819) 1 Bro. & B. 289.

Accordingly, on the 4th April the Hope Mills Company sent to the plaintiffs a cheque for Rs. 9,500 drawn by their agent on the Commercial Bank of India. This cheque was sent in payment of the said difference.

About 12 o'clock on the 4th April the plaintiffs sent the said cheque for collection to the defendant Bank with which they had banked for some years and to which they were in the habit of sending cheques drawn in their favour and at which they had an account.

At about 4-30 o'clock on the same day the plaintiffs received from the defendant Bank their pass-book in which the amount of the said cheque, *viz.* Rs. 9,500, appeared duly entered to their credit, the said entry being duly initialled by one of the officers of the defendant Bank.

After the receipt of the said pass-book the plaintiffs delivered the cotton to the new purchaser to whom it had been sold as abovementioned. The plaintiffs alleged that it was in the belief that the cheque had been duly honoured and that the amount had been received by the defendant Bank on their account that they delivered the cotton to the said purchaser.

On the next day (the 5th April) the defendant Bank returned the said cheque to the plaintiffs with a memorandum dated the 4th April, intimating that the said cheque had been dishonoured.

The following paragraphs of the plaint set forth the plaintiffs' case :—

4. The plaintiffs say that the defendant Bank by making the said entry as aforesaid and delivering the said pass-book to the plaintiffs led the plaintiffs to suppose that the said cheque had been duly honoured and the amount thereof paid in their account. And they submit that they were justified in believing that the said moneys had been so received ; the plaintiffs thereupon, on the same evening and after the receipt of the said pass-book, delivered the cotton to the purchaser thereof. The plaintiffs say that they would not have delivered any of the cotton if they had not believed that the said cheque had been duly honoured and if it had not been for the representation of the defendants by their entry in the said pass-book that the same had been honoured and the said moneys received in their account.

5. On the 5th April, 1900, the defendants returned the said cheque to the plaintiffs with a memorandum dated the 4th idem intimating that the said cheque had been dishonoured.

6. The plaintiffs say that it is impossible to recover the amount of the said

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cheque from the drawers thereof. The plaintiffs submit that under the circumstances aforesaid the defendants are liable to pay to them the amount of the said cheque. On the 13th June, 1900, the plaintiffs drew upon the defendants a cheque for the said sum of Rs. (9,500) nine thousand and five hundred, which the defendants refused to pay.

The plaintiffs thereupon sued to recover the said sum of Rs. 9,500 from the defendant Bank.

In their written statement the defendants admitted that the plaintiffs had an account with them and were in the habit of sending cheques to them for collection, but they did not admit that the amounts of such cheques were only credited to the plaintiffs in their pass-book *after collection*. They alleged that the plaintiffs were always aware that the cheques sent to the Bank had to be passed through the clearing-house, and that it was impossible to tell until the day after they had been sent to the clearing-house whether they had been honoured or dishonoured.

The defendant Bank further admitted that the abovementioned cheque upon the Commercial Bank had been sent to them (the defendants) on the 4th April for collection and that the amount of the cheque had been entered to the plaintiffs' credit in the plaintiffs' pass-book which was sent to the plaintiffs in the afternoon of the same day, but they alleged that the plaintiffs had sent their servant for the said pass-book, well knowing that it was impossible at that time for the defendant Bank to have passed the said cheque through the clearing-house, and that the credit entry of Rs. 9,500 did not imply that the said money had been received by the defendant Bank to the plaintiffs' credit.

The following paragraphs of their written statement state the substance of their defence:

4. The defendant Bank denies that by making the said entry and delivering the said pass-book to the plaintiffs it led the plaintiffs to suppose that the said cheque had been duly honoured and the amount thereof paid to their account. The defendant Bank does not admit any of the other allegations in the fourth paragraph of the plaint contained.

5. The defendant Bank says that at the time the plaintiffs sent for their pass-book as aforesaid, they well knew that the said cheque was likely to be dishonoured.

6. The defendant Bank says that on the 13th June, 1900, the plaintiffs had no funds with the said Bank from which the amount of the cheque for Rs. 9,500

drawn on that day could be met, and the said Bank was therefore justified in refusing to pay the same.

At the hearing the following facts appeared in evidence. On the 10th March the Hope Mills, through their agent Rangildas Bhukhandas, bought the abovementioned six hundred bales of cotton, at Rs. 278 per *candy*, for March delivery (*i.e.* from 15th to 25th March). The Mills, however, were in difficulties, and could not carry out the contract, and accordingly one Shridhan Gopinath agreed to take over the cotton at Rs. 243-8 per *candy*, and on the 22nd March it was arranged that the plaintiffs should give delivery to him at that price and that the difference should be paid to the plaintiffs by the Hope Mills. On the next day (23rd March) the Agent of the Mills (Rangildas) sent the plaintiffs a cheque for Rs. 9,500, which, however, was post-dated the 3rd April. This cheque was for the amount of the difference (approximately) between Rs. 278 for which the cotton had been sold to the Mills and the Rs. 243-8 for which it had been subsequently sold to Shridhan.

It appeared that on the 29th March the Agent of the Mills (Rangildas) drew another cheque for Rs. 5,000 on the Commercial Bank in favour of Shridhan, and that this cheque was handed over to the plaintiffs by Shridhan on that day in part payment under the contract, and on the same day was lodged in the defendant Bank and was credited to the plaintiffs.

On the 4th April the cheque for Rs. 9,500, which had been given to the plaintiffs on the 23rd March, was sent to the defendant Bank by the plaintiffs and was credited in the pass-book which was received back from the Bank by the plaintiffs at about 4-30 o'clock in the afternoon.

One hundred bales of the cotton were delivered by the plaintiffs to Shridhan in the afternoon of the 4th April and the rest were delivered the next day.

On that day the plaintiffs were informed by the defendants that the cheque for Rs. 9,500 was dishonoured. The plaintiffs then wrote to the Bank stating that they (the plaintiffs) had relied on the initialled entry in the pass-book and on the faith of it had delivered goods. Other letters passed between the plaintiffs and the Bank, and on the 21st April the plaintiffs wrote

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stating that they would hold the defendant Bank responsible for the Rs. 9,500.

Accordingly on the 13th June, 1900, the plaintiffs drew a cheque in their own favour on the defendant Bank for Rs. 9,500, and gave notice that unless it was paid, they would take legal proceedings against the Bank. The defendant Bank refused to pay this cheque, and the plaintiffs filed this suit.

The following issues were raised at the hearing :

(1) Whether the defendants were bound to honour the cheque drawn upon them by the plaintiffs on the 13th June, 1900?

(2) Whether the allegations in paragraph 3 of the plaint other than those admitted by the defendants in their written statement are correct?

(3) Whether the returning of the plaintiffs' pass-book by the defendants and the noting and initialling the amount of the original cheque therein was not a representation that the defendants had received payment of the said cheque or were prepared to give the plaintiffs the credit for the amount thereof?

(4) Whether the plaintiffs acted on such representation to their detriment as alleged?

(5) Whether the defendants are not bound to make such representation good to the plaintiffs?

(6) General issue.

*Lang* (Advocate General) and *Raikes* for plaintiffs.

The Bank is liable for the money claimed by the plaintiffs. The cheque for Rs. 9,500 was duly handed to the Bank for collection and its officer entered the amount to the plaintiffs' credit in his pass-book and sent the pass-book back to them. They acted on this representation by the Bank, and, assuming that the money had been received for them by the Bank, he delivered the goods to Shridhan. The Bank led the plaintiffs to suppose that it had received the money on their account. It cannot now deny that it did so. Grant on the Law of Banking (5th Edition), page 196; Encyclopædia of English Law, Vol. I, page 480. The entry is not shown to have been made by mistake. It was made in the ordinary course of business. *Shaw* v. *Picton*[1]; *Skyring* v. *Greenwood*[2]; *Hume* v. *Bolland*[3]; *Commercial Bank of Scotland* v. *Rhind*[4]; *McCaul* v. *Straus & Co.*[5]; *Emanuel* v. *Robarts.*[6]

(1) (1825) 4 B. & C. 715.
(2) (1825) 4 B. & C. 231.
(3) (1832) 1 C. & M. 130.
(4) (1860) 3 Macq. (H. L. C.) 643.
(5) (1883) Cababe & Ellis. 106.
(6) (1868) 9 B. & Sm. 121.

The defendants are estopped. *Carr* v. *London & N.-W. Railway Company*[1]; *Seton* v. *Lafone*[2]; *Sarat Chunder Dey* v. *Gopal Chunder Laha*[3]; Casperz on Estoppel, p. 273; *Simson* v. *Ingham*[4]; *Deutsche Bank* v. *Beriro*[5]; *Martin* v. *Morgan*.[6]

*Scott* and *Robertson* for defendants.

This suit is based upon a supposed estoppel. But there is none in this case. An estoppel does not of itself give rise to a cause of action. *Seton* v. *Lafone*[7]; *Carr* v. *London and N.-W. Railway Company*[8]; Bigelow on Estoppel, pp. 550, 563. The plaintiffs therefore have no cause of action on the ground of estoppel.

Then have they a claim for damages? They must prove damages; and they have not done so—*Hume* v. *Bolland*.[9] The Bank was not guilty of any negligence. On the evidence it is plain that when the cheque was given it was thought doubtful whether it would be cashed. The plaintiffs were bound to inform the Bank of that. *Boyd* v. *Emmerson*[10]; *Timmins* v. *Gibbins*.[11]

RUSSELL, J.:—The question in this case, put shortly, is whether the defendants, the National Bank, are liable to the plaintiffs in respect of a cheque for Rs. 9,500, drawn on the Commercial Bank, Bombay, by one Rangildas Bhukhandas (which was crossed and payable to bearer, and was delivered to the plaintiffs by the said Rangildas Bhukhandas on the 23rd March, 1900, but was post-dated the 3rd April, 1900), by reason of the defendant Bank having returned to the plaintiffs their pass-book on the 4th April, 1900, with the entry duly initialled by a European officer of the Bank, "Rupees ninety-five hundred, Rs. 9,500," although the cheque was dishonoured on the 4th April, and notice thereof given to the plaintiffs on the 5th.

The question is a novel one and of importance, inasmuch as the decision in this case will, in any event, necessitate the alteration of the practice whereby several Banks in Bombay have for

(1) (1875) L. R. 10 C. P. 307.
(2) (1887) 19 Q. B. D. 68.
(3) (1892) 20 Cal. 296.
(4) (1823) 2 B. & C. 65.
(5) (1896) 73 Law T. 669.
(6) (1819) 1 Bro. & B. 289.
(7) (1887) 19 Q. B. D. 68.
(8) (1875) L. R. 10 C. P. 307.
(9) (1832) 1 Cr. & M. 130 p. 138.
(10) (1834) 2 Ad. & Ell. 184 at p. 202.
(11) (1852) 17 Jur. 378.

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some years past been in the habit of crediting their customers with cheques paid in as cash, and initialling such entries by their European officers. (His Lordship then read the plaint and the written statement.)

Upon the plaint it is difficult to know what is the cause of action. Is it a breach of duty on the part of the defendant Bank, or is it a breach of contract, or is it a suit for money had and received, as contended by Mr. Raikes, in his reply? Mr. Robertson, for the defendant Bank (feeling this difficulty), raised the first issue in very general terms as follows:—

(1) Whether the defendant Bank was bound to honour the cheque drawn upon them by the plaintiffs on the 13th June, 1900.

Mr. Raikes thereupon, for the plaintiffs, raised the following issues:

(2) Whether the allegations in paragraph 3 of the plaint other than those admitted by the defendant Bank in their written statement are correct.

(3) Whether the returning of the plaintiff's pass-book by the defendant Bank and the noting and initialling the amount of the original cheque therein was not a representation that the defendant Bank had received payment of the said cheque or were prepared to give the plaintiff credit for the amount thereof.

(4) Whether the plaintiffs acted on such representation to their detriment as alleged.

(5) Whether the defendant Bank is not bound to make such representation good to the plaintiffs.

(6) The general issue.

My view of the plaint is that it intends to allege that the defendant Bank being the plaintiff's bankers, had had and received to the plaintiff's account the sum of Rs. 9,500, or had represented to the plaintiffs that they had had and received such sum in such a way that they are estopped from denying the fact, and thereupon were bound to honour Messrs. Nanu and Hormusjee's cheque of the 13th June, 1900. Mr. Robertson objected to issues 3 and 4 as not arising on the pleadings, but I could not say they did not, and at all events they were the issues the plaintiffs came to trial upon.

Before dealing with the legal questions involved it is important

to ascertain the facts of the case which, though somewhat detailed, are not complicated, and for the sake of clearness I shall put them into separate paragraphs numbered in their order. I would premise that the firm of Rangildas Bhukandas are the agents of the Hope Mills.

1. On the 10th of March, 1900, the plaintiffs' firm sold to the Hope Mills 600 bales of Broach cotton at Rs. 278 per *candy* for the March *vaida*, 15th to 25th March, and six delivery entries in due course addressed to the plaintiffs' *mukádam* were given by the plaintiffs in favour of the Hope Mills. On the 19th March a survey of the cotton was held, and the Hope Mills put their stamp on the bales. It is not quite clear whether the contract was that of the Hope Mills or of Rangildas Bhukandas their agents. Rangildas says it was his own contract. This point is not really material, for both the Hope Mills and Rangildas (as he says) were in difficulties, and are so still. Probably, if profitable, the contract would have been that of the agent of the Mill.

2. The plaintiffs demanded payment from the Hope Mills, and on the 20th March wrote to them the letter Exhibit G. No reply was sent thereto.

3. From the evidence of Shridhan Gopinath it appears that he was assisting Rangildas at first in getting the cotton surveyed, as he, Rangildas, had told Shridhan's firm to get it sold, and he (Shridhan) says that he had the delivery orders in his possession from the 19th March, the date of the survey. Subsequently, however, *i.e.* on the 21st or 22nd March, Shridhan bought the 600 bales from the Hope Mills at Rs. 243-8. No written contract was, however, executed as he says the cotton was bought ready.

4. On the 22nd March the plaintiff Mowji says he saw Rangildas at the plaintiff's *pedhi* in Hornby Road in the Fort, and this is his account *verbatim* of the interview :—

> We came to an arrangement. He said he would send Rs. 10,000 just then, and as to the rest we should give delivery to Shridhan and Co. at Rs. 243, and take the rest of the money at that rate from them. I said I could do this, provided he paid Rs. 10,000. He sent a cheque on the 23rd March for Rs. 9,500. The cheque in question was dated the 3rd April, *i.e.* D-1. I sent a man to tell him I could not accept a post-dated cheque like that, and I must have cash. Rangildas could not be seen after that; on inquiry at the office we were told he was at Bándra. I told my attorneys to write a letter to the Hope Mills.

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The cheque for Rs. 9,500 was therefore to be the approximate difference between Rs. 278 and Rs. 243-8 on the 600 bales of cotton.

5. On the 23rd March, 1900, the following memorandum was sent by the Hope Mills Company to the plaintiffs:

We send you herewith a cheque for Rs. 9,500 on the Commercial Bank as arranged with your Mr. Mowji by our Mr. Rangildas yesterday. Please accept the same.

On the 28th March a letter was written by Messrs. Nanu and Hormusjee, plaintiff's attorneys, to Rangildas Bhukandas in reply. The terms of that letter are very important, and I read it at length. I draw special attention to the words at the close of that letter "*if cashed.*"

*Bombay, 28th March, 1900.*

MESSRS. HOPE MILLS, LIMITED.

DEAR SIRS,

We are instructed by Messrs. Shamji Ludha and Co. to acknowledge the receipt of your letter of the 23rd instant and the cheque for Rs. (9,500) nine thousand and five hundred that accompanied the same.

Our clients find that the cheque is one signed by the Agent's firm and bears date the 3rd April next, and that it is not payable until that date. Our client will not accept a cheque payable on the 3rd. They want a cheque payable to-day. Please therefore send us another cheque or alter the date of the present cheque, and have the same initialled by your Agents or send us moneys in cash.

Please make arrangements for immediate delivery. If the bales are not paid for and taken delivery of within 24 hours from the receipt hereof, please note that the goods will be sold on your account and at your risk, either by public sale or private contract. There is already a demand for the goods at Rs. (230) two hundred and thirty per *candy*, discount as per Colaba usage. Please inform us whether our client is to sell the goods at the rate offered. If we do not hear from you we shall conclude that you are unwilling to accept this offer and our clients will proceed to sell without further notice. The cheque is for the approximate amount of difference which our clients will give you credit for if cashed and if your proposed purchaser will pay them and take delivery.

6. It is not clear upon the evidence in what way the plaintiff came in contact with Shridhan directly, for the plaintiff Mowji puts it on the evening of the 28th March, while Shridhan puts it on the 29th March. But I find that on the evening of the 28th March an interview did take place between Mowji and Shridhan. As to what happened Mowji and Shridhan, as might perhaps be

expected, are directly at variance. Shridhan's account of it in examination-in-chief is as follows:—

Rangildas drew a cheque in my favour for Rs. 5,000 on the Commercial Bank, Bombay, on the 29th March, 1900. He handed it to his *mehta*. The *mehta* went with me to Shamji Ludha and Co. I saw the plaintiff there (Mowji). Then the *mehta* told the plaintiff to give delivery to me at Rs. 243 per *candy*, and handed over the cheque to him, and told him to give credit to me for the Rs. 5,000. The Rs. 5,000 have to be credited to me on a previous account. When we got delivery from Shamji Ludha we had to pay Rs. 243 per *candy* less Rs. 5,000. Mowji agreed to that. The arrangement was that we were to pay Rs. 243 per *candy*, and Shamji Ludha was to deliver 600 bales at that price provided the cheque for Rs. 5,000 was honoured. There was some talk about my price and Shamji Ludha's price. The *mehta* said something about an arrangement going on between Shamji Ludha and his master as to the differences which Rangildas had to pay. The cheque was handed over, and Shamji said he could get the cheque cashed and could deliver. All this took place on the 29th March.

Then he says in cross-examination:

On the 29th March I had my first interview with the plaintiff Mowji at Colába. Rangildas' *mehta* and Runchordas were present also. I don't know the name of Rangildas' *mehta*. This was at Shamji Ludha's *jutha*. Rangildas' *mehta* talked with him about the delivery of the 600 bales, and offered him a cheque for Rs. 5,000 and to deliver the cotton to us at Rs. 243 and give us credit for Rs. 5,000. I was to get credit for Rs. 5,000 as the market had gone down, and about Rs. 30,000 to Rs. 35,000 were due to us by the Hope Mills. The cheque was not given direct to us by Rangildas, because he feared we might keep the Rs. 5,000 against the old account and not take delivery of the cotton. On the 29th I knew the Hope Mills had bought the cotton at a higher price than I had agreed to give for it. On the 29th I knew the plaintiff had then received a post-dated cheque. I did not know that I was not to get delivery of the cotton till the post-dated cheque was paid.

7. On the other hand, the plaintiff says he first saw Shridhan as to the arrangement that he was to buy the cotton on the evening of the 28th March:

I saw Shridhan Gopinath himself. It was not then arranged that Shridhan and Co. were to buy at Rs. 243-8 and Rangildas to pay Rs. 5,000. The arrangement was that money for 600 bales at Rs. 243 was to be received from Shridhan and Co., provided we got Rs. 9,500 from Rangildas in respect of the cheque. That was the only arrangement that was made, and that the cotton was to be delivered to Shridhan after the receipt of the Rs. 9,500. That was the whole arrangement. If the money was not received no delivery was to be given to Shridhan: Rs. 5,000 was to be credited on account of the transaction.

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Rangildas and Shridhan's man had come to deliver the Rs. 5,000 cheque which had been drawn by the Hope Mills in favour of Shridhan. It was to be in part payment of the Rs. 243-8 per *candy*. I was not to deliver the cotton unless the Rs. 9,500 cheque was honoured.

In his examination-in-chief Mowji says that Shridhan did not know it was a post-dated cheque.

8. On the 29th March the cheque for Rs. 5,000 was duly credited to the plaintiffs in the pass-book and was duly honoured.

9. The cheque for Rs. 9,500 which had been given, as I have stated, to the plaintiffs on the 23rd March, but was post-dated the 3rd April, was not sent to the defendant Bank on that day, but was so sent on the 4th April. According to the evidence of Mowji, Gopaldas Raghoji (the second plaintiff) and the plaintiffs' *mehta* Lukmichund, the *mehta* took it to the defendant Bank at between 12 and 12-30 on that day with the pass-book and slip book and slip (No. 8). Together with it was sent another cheque for Rs. 1,24,470-12, which was duly honoured, having been drawn on the Yokohama Specie Bank. Lukmichund brought back the counterfoils of both slips duly initialled in the slip book (K). The slip was, as usual, left with the Bank.

10. After it had been so sent the first plaintiff went to Colába at about 3-30 P.M. when Shridhan's man Ramchund pressed him for delivery of the cotton, whereupon the first plaintiff says he told him to wait a little, and then went to the Cotton Exchange Room to telephone to his partner to find out whether the pass-book had been returned or not with the Rs. 9,500 credited therein. The first plaintiff says he got an answer: "Wait a little. Our man has gone to the Bank to get the pass-book. As soon as he returns you will get the answer." The second plaintiff was the man at the other end of the telephone who sent the above answer. Lukmichund, the *mehta*, was the man who was sent to the Bank for the pass-book, and he says he went to the Bank at 3-30 or 3-45 P.M., and was handed the pass-book with the Rs. 1,24,470-12 credited and initialled therein. He says that he noticed that only one cheque had been credited, and thereupon gave back the pass-book to "the Hindu" at the Bank, who went inside with the pass-book, and returned after some time, and handed the pass-book to him, and he found that the Rs. 9,500 had been credited therein,

whereupon he took back the book and gave it to the second plaintiff.

11. The Rs. 9,500 are thus credited: "Rupees ninety-five hundred"; then come the initials of Mr. Jas. Noble Johnstone, an assistant in the defendants' Bank, and then the figures Rs. 9,500.

12. The second plaintiff says it was 4-10 P.M. when Lukmichund returned with the pass-book, but I believe it was (as stated in the plaint and in the plaintiffs' attorney's letter, which is part of Exhibit C,) 4-30 P.M. The second plaintiff says that he then telephoned to Colába that the *mehta* had brought the pass-book from the Bank, and the cheques, which had been sent, had been credited therein. The first plaintiff says that when he got that message he gave orders to his man to let Shridhan begin to take delivery of the 600 bales, and it is admitted that 100 bales were delivered on that day and Rs. 12,000 paid by Shridhan to the plaintiffs.

13. On the next day, *i.e.* 5th April, the first plaintiff says he delivered another 100 bales to Shridhan, after which he got the slip B from the defendant Bank giving him notice of dishonour of the cheque D-1, which he says he got at 1-30 that day. After the notice of dishonour the other 400 bales were delivered.

14. It appears that the plaintiffs have not called on Rangildas to pay the Rs. 9,500, but on the 5th April their attorneys wrote the following letter to the Hope Mills:

DEAR SIRS,

In continuation of our letter to you of the 28th March last, written on behalf of our clients, Messrs. Shamji Ludha and Co., we are instructed to inform you that the cheque therein mentioned which our clients were persuaded to keep and present on due date was on presentation dishonoured. Our clients have already delivered 100 bales to your purchasers, and will of course deliver the remaining 500 bales to them, but we hereby require you at once to pay up Rs. (9,500) nine thousand and five hundred, the amount of the cheque. They will send you their final account in due course, but they insist upon the amount of the cheque being paid forthwith. "Yours truly,

(Signed) NANU AND HORMASJI, Solicitors.

On the same day the correspondence with the plaintiff's attorneys and the defendant Bank began. Their first letter was as follows:

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*Bombay, 5th April, 1900.*

TO THE NATIONAL BANK OF INDIA, LIMITED.

DEAR SIRS,

Our clients, Messrs. Shamji Ludha and Co., have asked us to write to you this letter.

Our clients yesterday at about 12 noon presented to your Bank a cheque, dated 3rd instant, drawn by Rangildas Bhukandas and Co. on the Commercial Bank of India, Limited, for Rs. 9,500 for collection and to be credited to their account with yourselves.

At about 4-30 P.M. yesterday our clients' pass-book was returned to their man with the amount of the cheque duly credited to them, the entry being duly initialled. Relying upon the credit entry that the cheque was honoured, our clients handed over certain goods to the order of Rangildas Bhukandas and Co. after 5 P.M.

Our clients are surprised to receive from you your memo. of date returning the aforesaid cheque. Please note that our clients hold your Bank responsible for the amount of the cheque.

Yours faithfully,

(Signed) NANU AND HORMASJI.

The subsequent correspondence is annexed to the plaint.

On the 26th April the defendant Bank wrote the letter of that date to the plaintiffs, enclosing the cheque D-1 and dishonour slip (D-2). On the 13th June the plaintiffs' attorneys sent to the defendant Bank a cheque for Rs. 9,500 drawn by the plaintiffs on the defendant Bank of which they demanded payment. The defendant Bank declined to pay.

15. From the evidence in the case it appears that there is a clearing-house at the Bank of Bombay to which cheques are sent up till 2 o'clock, and there exchanged between the various Banks in Bombay, and from the clearing-house the cheques come to the Banks upon which they are drawn at or about 3 P.M., and if dishonoured are returned to the Bank from whom they were received at or about 4 P.M. Crushnarao Sadashiv Pittak, clerk in the Commercial Bank, says that the cheque D-1 came to them at 3 P.M., and would in the ordinary course have been returned to the National Bank at 4 P.M. It also appears that if cheques are paid into a Bank after 2 P.M., they are not sent to the clearing-house till next day, but may be sent to the Bank direct for collection. I am by no means satisfied that the plaintiffs, who are men of very considerable business experience in Bombay, were not aware of the practice of the clearing-house.

16. A considerable amount of evidence as to the practice of

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Banks with regard to initialling pass-books was given before me, which, although objected to, seemed to me to be relevant, and I accordingly admitted it upon the authority of *Mackenzie* v. *Dunlop*[1] and section 13 of the Evidence Act. From that evidence it appears to have been the practice of several Banks in Bombay for a number of years to enter in their customers' pass-books cheques of other Banks paid in by their customers, and to initial them by a European officer as cash, whether the cheques have been honoured or not. In the event of the cheque being dishonoured, what is called a reversing debit is entered, debiting the amount to the customer. The Bank of Bombay, however, wisely have not adopted this practice, and the sooner the other Banks alter it the better. It can very easily be altered, for all that a Bank has to do in such a case would be, initial the counterfoil slip as being receipt of a cheque, enter the cheque as a cheque for the amount thereof in the pass-book, but not initial the pass-book until the cheque has been cashed in due course. Notice of this practice should be given to the customers of each Bank, and in my opinion no Bank should issue any pass-book to its customers without having its rules printed in each book in English if the customer knows English, and in the vernacular if the customer does not. In the present instance I see no reason to believe that the plaintiff ever had his attention drawn to the rules of the defendant Bank, or if he had, would have understood them. I confess I do not agree with Mr. Henry S. Johnstone when he said, *inter alia*, that the customer must not depend upon the pass-book at all. The case I put during the argument seems to me to be in point. Supposing a person sells a horse to a friend or a stranger of whose pecuniary position he has doubts, a not uncommon circumstance, he is paid by a cheque drawn upon a Bank A in the morning which he pays at once into his Bank B. He sends for his pass-book after the Bank have had time to cash the cheque, or to ascertain if it had been dishonoured to see if that cheque has been honoured, and sees it credited to him as cash, and the entry initialled by a European officer of the Bank. Relying upon that representation he delivers the horse to the purchaser. Under these circumstances I am of opinion that the

(1) (1860) 3 Macq. H. L. C. 22.

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Bank clearly would be liable. Under such circumstances the Bank is the agent to collect—what? Surely cash. When they say they owe so much cash to the customer, what does it mean but that they have collected the cash? If they have collected the cash, how could they enter it *except* in the way that has been done in the present case?

17. But the present case is not one of such a simple character, and I proceed to deal with the legal aspects of it.

18. In the first place Mr. Scott was right in his contention that estoppel does not give rise to an action of itself. Pollock on Contracts, pages 505, 506 (6th Ed.), in dealing with estoppel, says: "The rule is not a rule of substantive law, in the sense that it does not declare any immediate right or claim. It is a rule of evidence, but capable of having the gravest effect on the substantive rights of parties;" and Bowen, L.J., in *Low* v. *Bouverie*,[1] says (page 105): "But we must be guarded in the way in which we understand the remedy where there is an estoppel. Estoppel is only a rule of evidence; you cannot found an action on estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said." I apprehend, therefore, that the question I must put to my mind is—Are the circumstances of this case such that the defendant Bank ought not to be permitted to deny that they received the Rs. 9,500 to the use of the plaintiffs?

19. The first point I shall consider is what was the relation between the plaintiffs and the defendant Bank when the cheque for Rs. 9,500 was sent to them on the morning of the 4th April. I am of opinion that the plaintiffs constituted the defendant Bank their agent for collection, for a banker receiving a cheque becomes the agent for presentment of the man from whom he receives it, even when the presentment has to be made to himself as banker —*Bailey* v. *Bodenham*.[2] This being so, what is the effect of the Rs. 9,500 being credited to the plaintiff in the pass-book? Surely the effect of that is that the Bank acknowledge themselves to be the debtors of the plaintiffs for that amount, and they constitute themselves holders for value of the cheque, for when a customer

(1) (1891) 3 Ch. 105. (2) (1864) 33 L. J. C. P. 252.

pays a cheque to his banker, intending that it should be paid to his credit, and it is so placed, the bankers become immediately holders of the cheque for value, even though the customer's account is not overdrawn. *Ex parte Rickdale*[1]; *National Bank* v. *Silke*[2]; *Royal Bank of Scotland* v. *Tottenham*.[3] The law of Scotland is the same—*M'Lean* v. *Clydesdale Banking Company*.[4] "It is generally considered that if the transferee presents the cheque and procures it to be certified, or the banker promises to place it to his credit 'or if he holds any other species of conversation which practically amounts to demanding and receiving a promise of a transfer of credit as equivalent to an actual payment, the effect will be the same as if he had received the money in cash, and the Bank's indebtedness to him will be equally full and irrevocable'—Morse on Banks, page 321, quoted and approved in *National Bank* v. *Burkhardt*[5]." See 3 Ruling Cases, page 762.

20. What a pass-book is is too well known to need description here, but it will be found correctly described in Grant on Banking (5th Edition), page 194. At page 196 of the same book it is stated: "Credit given in a pass-book binds the banker, if on the faith of such credit the customer has altered his position, as by drawing on the credit &c., for, by entering the sums to the customer's credit, they lead him to suppose that they have received them on his account. When, however, there has been no such alteration, the banker is allowed to show that the entries were made by mistake; for the pass-book is only *primâ facie* evidence against him" (see the cases there cited). For this purpose the entries in the pass-book, I am of opinion, are the same as receipts and acknowledgments, with regard to which Lord Tenterden said in *Graves* v. *Key*[6] (page 318): "A receipt is an admission only, and the general rule is that an admission, though evidence against the person who made it, and those claiming under him, is not conclusive evidence, except as to the person who may have been induced by it to alter his position—*Straton* v. *Rastal*, 2 T. R. 266; *Wyatt* v. *Marquis of Hertford*, 3 East 147; *Herne* v.

(1) (1882) 19 Ch. D. 409.
(2) (1891) 1 Q. B. 435.
(3) (1894) 2 Q. B. 715.
(4) (1883) 9 A. C. 95.
(5) (1879) 100 U. S. 688.
(6) (1832) 3 B. & Ad. 313.

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*Rogers*, 9 B. & C. 586." To the same effect is *Gaden* v. *Newfoundland Savings Bank*,[1] upon which Mr. Scott relied. That case on the facts is distinguishable, for there the defendants were a Savings Bank "whose duty was only to receive money in deposits" (page 286).

21. This being so, the next question to consider is whether the facts as above set out bring the case within section 115 of the Evidence Act. Since the case of *Sarat Chunder* v. *Gopal Chunder*,[2] it must, I think, be taken as settled that that section does not differ from the English law. Mr. Raikes argued that both the third and the fourth propositions in the well-known case of *Carr* v. *L. & N. W. Ry.*[3] applied. (Admittedly the first and second proposition in that case do not apply.) The third proposition is "that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as so represented." I deal with this proposition first. I think that the words "in the ordinary course of business" should be added after "a reasonable man" in the above proposition. See per Lord Esher, M.R., in *Seton* v. *Lafone*[4] (considered hereafter in the fourth proposition).

22. "An estoppel must be clear and non-ambiguous," per Kay, L.J., in *Low* v. *Bouverie*, *ubi supra* page 113. It must also be "free, voluntary, and without artifice"—Bigelow on Estoppel, page 563. In the present case it is clear upon the evidence of Messrs. H. & J. Johnstone that the defendant Bank never intended the plaintiffs to act upon the faith of cash for the cheque having been actually received. In the next place it is shown that according to the ordinary course of business the defendant Bank would have till the next day to give notice of the dishonour of the cheque, if it was dishonoured; and, according to the system adopted by at least three of the Banks in Bombay, the acknowledgment

(1) (1900) A. C. 281, 286.
(2) (1892) 20 Cal. 296.
(3) (1875) L. R. 10 C. P. 307.
(4) (1887) 19 Q. B. D. 72.

in the present form was not intended to be an acknowledgment as of cash, clear and unambiguous. Further, and this to my mind is most important, the cheque was a post-dated cheque, which had been with the plaintiffs since the 23rd March. The plaintiffs had very great reason to doubt the solvency of the Hope Mills and Rangildas. Paragraph 5 of the plaint is well founded, which says "that at the time the plaintiffs sent for their pass-book they well knew that the said cheque was likely to be dishonoured." It therefore appears to me that the principle stated in *Martin* v. *Morgan*,[1] by Richardson, J., applies, when he says: "It is sufficient that the parties did not deal on equal terms. The defendants knew that Burmester and Co. were in a state of probable insolvency, and concealed this from the plaintiffs, who were ignorant of it. This brings the case within the rule of law that a party paying money in ignorance of circumstances with which the receiver is acquainted is not on equal terms with him, and therefore entitled to recover it back." The expressions in the letters Exhibits H. and I. "if cashed" and "were persuaded" tend strongly to show that the plaintiffs had every reason to doubt the solvency of the drawer of the cheque. The plaintiffs were principals liable to indemnify the Bank for any loss incurred by them or their agents by reason of the principal's default, and therefore the estoppel was not so clear and unambiguous as to justify the plaintiffs in relying upon it. I am therefore of opinion that under the particular and peculiar circumstances of this case, if the plaintiff, the principal, intended to make the defendant Bank his agents liable for the representation in the pass-book, it was incumbent on him to ascertain whether the estoppel on which he intended to rely was clear and unambiguous.

23. The next question is whether the plaintiffs acted upon or changed their position in consequence of the representation of the Bank. Mr. Scott argued that the contract with Shridhan was a novation of the original contract. Mr. Raikes said this was not so, but that there was one continuous contract dependent on the honouring of the cheque for Rs. 9,500, and in consideration of

(1) (1819) 1 Bro. & B. 289.

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the cheque for Rs. 5,000 and due payment for the rest of the 600 bales. And in support of his argument Mr. Raikes rightly relied upon the Exhibits Nos. 6 and O, P, Q, and R, showing how the plaintiffs in their books dealt with the moneys received for the 600 bales of cotton. There are difficulties in the way of accepting either view. In the way of the novation theory there is the admitted fact that no delivery was made till the afternoon of the 4th April. I do not believe Shridhan when he said that he was waiting to arrange for insurance and loans from the Bank (*i.e.* of Bombay) before he took delivery. I do not believe the plaintiff (Mowji) when he says that Shridhan was pressing him continually to give delivery. No letter to that effect is produced, and a rapidly falling market, as a rule, is not one in which a purchaser presses for delivery. On the other hand, if the contract was one contingent on the payment of the Rs. 9,500 cheque, it is an extraordinary thing that after notice of dishonour on the 5th April by 1-30, the plaintiffs should have gone on delivering to Shridhan. There was no obligation on them to do so if the contingency existed. The first plaintiff's view of the contract is peculiar when he says "Shridhan was bound to take delivery, but I was not bound to give delivery till the Rs. 9,500 had been received." The plaintiff (Mowji) swears that Shridhan did not know that the cheque for Rs. 9,500 was post-dated. This I cannot believe. Shridhan swears he did know of it, and the probabilities were all in favour of that being so. Again, I have held it proved that the pass-book was not returned to the plaintiffs by the defendant Bank till 4-30 P.M. on the 4th April. But the plaintiff is very precise in his evidence when he says "that Shridhan at 4 P.M. asked for the delivery of the 600 bales. He asked at 4 P.M. if I was bound to deliver to him. I said Yes, we are bound." In the face of this evidence, how can I find that the delivery by the plaintiffs to Shridhan was made by reason of a representation by the defendant Bank, which was not made to the plaintiffs till 4-30 P.M. at the earliest? The true position I believe was this. The plaintiffs no doubt, having got the post-dated cheque, were desirous of not delivering till after the 3rd April. Shridhan, with the market going down rapidly, was not anxious to take delivery. Both of them knew that the cheque

for Rs. 9,500 was post-dated, and consequently that Rangildas (or the Hope Mills) was in a shaky pecuniary condition, but might possibly be put in funds before the 3rd April, and under no circumstances would the cheque be honoured before that day.

24. Looking at all the circumstances of the case, and the position of the parties and the evidence given, I am not satisfied that in delivering the 600 bales of cotton to Shridhan the plaintiffs were *bona fide* relying on the representation made by the defendant Bank in their pass-book. I am supported in this opinion by the fact that the plaintiffs went on delivering the cotton to Shridhan, although they knew by 1-30 o'clock on the 5th April that the cheque was dishonoured. How are the plaintiffs entitled to say to the defendant Bank, "You are liable to pay me Rs. 9,500, for you represented to me you had that money of mine in your hands, and thereupon I delivered 600 bales of cotton," when the evidence shows that before delivering 400 of the 600 bales they knew that the representation of the defendant Bank was incorrect. Why after 1-30 on the 5th April, if the contract was contingent on payment of the Rs. 9,500 cheque, did they not stop further deliveries to Shridhan, giving notice to the Bank of the position and claim damages. Because they could not have proved any damages, and as to the 400 bales, preferred to rest upon the doubtful question of estoppel, and the undoubted solvency of the National Bank. That the plaintiffs were extremely anxious to make the defendant Bank liable is shown by their attorney's letter of the 5th April (the first was in Exhibit C), and in their conduct towards the defendant Bank the plaintiffs, I think, showed a considerable amount of "artifice."

25. Next comes the question whether the case falls within the fourth proposition in *Carr* v. *L. & N. W. Railway Company*, which is: "If in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist." Together with this must be taken the judgment of Lord Esher,

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M.R., in *Seton* v. *Lafone*,[1] where at page 72 he says: "It is alleged there was no negligence, because there was no duty. I protest that, if a man in the course of business volunteers to make a statement on which it is probable that in the course of business another will act, there is a duty which arises towards the person to whom he makes that statement. There is clearly a duty not to state a thing which is false to his knowledge, and, further than that, I think there is a duty to take reasonable care that the statement shall be correct." The words "ordinary course of business" here used ought, I think, to be included in the third proposition in *Carr* v. *L. & N. W. Railway*, and I included them there. Does the conduct of the defendant Bank come within the proposition? Now in the first place I do not think the defendant Bank made a statement in which it was probable that the plaintiffs in the ordinary course of business and in the circumstances of this case would act. The plaintiffs are men of business, and for over twenty years had had an account with the defendant Bank and another Bank, in which the same system of crediting cheques in the customers' pass-book was carried on. I feel great difficulty in believing that the plaintiffs were entirely ignorant of the practice of the clearing-house in Bombay. In any event the plaintiffs must be taken to have known that the Bank would have reasonable time to give them notice of dishonour of the cheque.

27. On the other hand, I am of opinion that the defendant Bank in this case, in stating as they did that cash had been received for the cheque, did state a thing that was false to their knowledge, and they also were guilty of a breach of their duty to take reasonable care that that statement should be correct within the judgment of Lord Esher above cited, but as I have above intimated, the plaintiffs have not satisfied me that they *bona fide* acted upon that statement. They certainly did not act on it in delivering the 400 bales.

28. Apart from the special circumstances of the present case which I have dealt with above, the case of the *Deutsche Bank* v. *Beriro*,[2] relied upon by Mr. Raikes in reply, would have strongly supported the plaintiffs' claim. There A, the endorsee

(1) (1887) 19 Q. B. D. 68. (2) (1895) 73 L. T. 669.

of a bill of exchange resident abroad, endorsed it to the defendants his agents in London for collection. The defendants endorsed it to the plaintiffs, and sent it to them for the same purpose, and they forwarded it to their agents. The plaintiffs, under a misunderstanding, informed the defendants that the bill had been paid, and sent them a cheque for the amount. Thereupon the defendants intimated the same to A, and credited him with the amount of the bill. Mathew, J., decided on the authority of *Skyring* v. *Greenwood*,[1] that as the plaintiffs had wrongfully informed the defendants that the bill had been paid, they could not recover the amount of the bill when the defendants had nothing to do with the mistake of fact; and also that the plaintiffs were estopped by the representation which they had made to the defendants, and upon which the defendants had acted. The Court of Appeal upheld Mathew, J. I should add that in the present case it was not suggested, nor was it part of the plaintiffs' case that the initialling officer, Mr. J. N. Johnstone, had by mistake initialled the entry, *i. e.* after noticing that the cheque had been dishonoured.

29. Considerable argument was addressed to me upon the question that the plaintiffs by delivering the 600 bales to Shridhan, having regard to the state of the market, not only sustained no loss by the delivery, but were benefited thereby, but I am of opinion that Mr. Raikes' answer to it was correct, when he said that in a case of this nature the Court will not consider the question of detriment, for in any case the unpaid vendor who has got his goods is in a better position than the unpaid vendor who has parted with them. Moreover, as I have pointed out, the claim is for money had and received and not for damages.

30. If it is material (though I do not think that it is) I find that the allegations in paragraph 6 of the plaint: "The plaintiffs say that it is impossible to recover the amount of the said cheque from the drawers thereof" have not been proved to my satisfaction. No real effort has been made by the plaintiffs to recover the amount from Rangildas or the Hope Mills, and since

(1) (1825) 4 B. & C. 289.

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the 4th April their only object of attack has been the defendant Bank.

31. I need only mention one other matter, and that is that Mr. Robertson, in cross-examining the plaintiff Mowji, asked him whether he had not presented the cheque to the Commercial Bank on the 3rd April before he paid it into the defendant Bank. This point was not suggested in the written statement or the issues, and as it involved what would have been distinct fraud on the part of the plaintiffs, I ruled that a supplemental written statement setting it up must be put in, which was not done.

32. Upon the whole, therefore, I have come to the conclusion that the plaintiffs' case fails. I accordingly find on the issues as follows:—(1) The defendant Bank was not bound to honour the cheque drawn upon them by the plaintiffs on the 13th June, 1900. (2) I find the allegations in paragraph 3 of the plaint to be correct. (3) I find that the returning of the plaintiffs' pass-book by the defendants, and the noting and initialling the amount of the original cheque therein, was a representation that the defendant Bank had received payment of the said cheque and were prepared to give the plaintiffs credit for the amount thereof. (4) I am not satisfied that the plaintiffs acted on such representation. It is not necessary, as I have above pointed out, to say whether they acted to their detriment as alleged. (5) I find that the defendant Bank are not bound under the circumstances of this case to make such representation good to the plaintiffs. (6) I find that plaintiffs are not entitled to the relief claimed or any part thereof, and accordingly dismiss the suit with costs.

*Suit dismissed.*

Attorneys for plaintiffs:—*Messrs. Nanu and Hormusji.*

Attorneys for defendants:—*Messrs. Little and Co.*

# APPELLATE CIVIL.

*Before Sir L. Jenkins, Kt., Chief Justice, and Mr. Justice Ranade.*

GULABCHAND GAMNAJI (ORIGINAL OPPONENT), APPELLANT, *v.* MOTI CHATRAJI (ORIGINAL APPLICANT), RESPONDENT.* 1900. *September* 11.

*Succession Certificate Act (VII of 1889), sections 6, 7 and 9—Summary proceedings—Questions of disputed adoption not to be determined in such proceedings—Security—Guardian's right to certificate on behalf of the minor—Guardian and Ward—Minor—Practice—Procedure.*

Questions arising under the Succession Certificate Act (VII of 1889) are to be determined by a summary proceeding, *i.e.* by a short inquiry leading up to and resulting in a rapid decision in contrast with the lengthy investigation which may be required for the more tardy determination of a regular suit. The nature of the inquiry must depend on the circumstances of each case.

An application by a guardian of a minor is not contemplated by section 6, clause (*d*), of Act VII of 1889, which only permits the petitioner, who claims the right for himself, to apply.

Where on an application for a certificate under the Succession Certificate Act (VII of 1889), section 6, questions of adoption affecting the right to the certificate were raised, which could not be summarily disposed of,

*Held*, that the Judge ought to have decided the *primâ facie* right of the applicant under clause 3 or clause 4 of section 7 of the Act without waiting to decide the issue raised as to the adoption.

APPEAL from the decision of E. H. Moscardi, District Judge of Surat.

The applicant, Moti Chatraji, applied under the Succession Certificate Act (VII of 1889), section 6, for a certificate to collect the debts due to one Bai Dahi, the widow of Gamna Karmaji, the applicant's uncle (father's brother).

He alleged that a few days before her death Bai Dahi adopted his (the applicant's) minor son Virchand, and that on her death Virchand became entitled to succeed to all her property. He therefore, as father and guardian of the minor, applied for a certificate to enable him to collect the debts due to the estate.

The opponent Gulabchand disputed both the factum and validity of Virchand's adoption. He contended that he himself was the adopted son of Bai Dahi, and as such he claimed to be entitled to the certificate.

* Appeal No. 57 of 1900.

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The District Judge raised issues as to the alleged adoptions and as to the right of the applicant to obtain a certificate, and both parties tendered numerous witnesses to establish their respective cases.

The District Judge, after repeated adjournments, finally decided the case on 12th February, 1900. He held that the applicant was the nearest heir and kinsman of the deceased Bai Dahi's husband; that his son Virchand had been legally adopted by Bai Dhai on 20th January, 1898; that the opponent Gulabchand's adoption was not proved, and that the applicant, Moti Chatraji, was entitled, as guardian of the minor Virchand, to the certificate prayed for.

He therefore issued an order directing that a certificate should be issued to Moti Chatraji, the applicant, as guardian of the minor Virchand.

Against this decision the opponent, Gulabchand, appealed to the High Court.

*G. S. Rao* for appellant.

*Manubhai Nanabhai* for respondent.

JENKINS, C.J.:—I think the mode in which the District Judge has allowed this case to be conducted clearly shows he does not appreciate the purpose and scheme of the Succession Certificate Act, 1889. This is an Act to facilitate the collection of debts on successions and afford protection to parties paying debts to the representatives of deceased persons. It recites that it is expedient to facilitate the collection of debts on successions and afford protection to parties paying debts to the representatives of deceased persons. And by section 7 it is provided that—

(1) If the District Court is satisfied that there is ground for entertaining the application, it shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing—

(*a*) to be served on any person to whom, in the opinion of the Court, special notice of the application should be given, and

(*b*) to be posted on some conspicuous part of the Court-house and published in such other manner, if any, as the Court, subject to any rules made by the High Court in this behalf, thinks fit;

and upon the day fixed, or as soon thereafter as may be practicable, shall proceed to decide in a summary manner the right to the certificate.

(2) When the Court decides the right thereto to belong to the applicant, it shall make an order for the grant of the certificate to him.

(3) If the Court cannot decide the right to the certificate without determining questions of law or fact which seem to it to be too intricate and difficult for determination in a summary proceeding, it may nevertheless grant a certificate to the applicant if he appears to be the person having *primâ facie* the best title thereto.

(4) When there are more applicants than one for a certificate, and it appears to the Court that more than one of such applicants are interested in the estate of the deceased, the Court may, in deciding to whom the certificate is to be granted, have regard to the extent of interest, and the fitness in other respects, of the applicants.

It is therefore obvious, it was contemplated that questions arising under this Act were to be determined by a summary proceeding. It may not be possible to precisely define a summary proceeding. It is enough for the present purpose to say that when the Legislature requires the Court to decide in a summary manner the right to the certificate, it contemplated a short enquiry, leading up to and resulting in a rapid decision, in contrast with the lengthy investigation which may be required for the more tardy determination of a regular suit. The nature of this enquiry must depend on the circumstances of each case, but here it is perfectly clear that when the Judge found the course these proceedings were going to take, he ought, in the exercise of his judicial discretion, to have declined to allow the parties to protract this litigation to a length little short of scandalous. The application was made on the 8th of June, 1898, and it was actually not until the 12th of February, 1900, close on two years after, that judgment was pronounced. During that period there were no less than fourteen adjournments while the Judge allowed the applicant to call no less than thirteen witnesses. The opponent apparently asked for summonses for fourteen witnesses. Fortunately, however, only four were served, and only one of them examined. Under these circumstances, more especially when regard is had to the nature of the question involved, the Judge should have acted under section 7 (3). The result is that there has been all this waste of time and expense for no useful purpose; for section 25 provides: "No decision under this Act upon any question of right between any parties shall be held to bar the trial

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of the same question in any suit or in any other proceeding between the same parties, and nothing in this Act shall be construed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest or dividend on any security, to account therefor to the person lawfully entitled thereto." Therefore the whole of this question will have to be fought over again.

Then the District Judge has allowed the application to be made for a certificate to collect the debts belonging to the estate of Bai Dahi, and made his order in those terms, though it is obvious that the debts belong to the estate of her husband. In the next place he has granted a certificate to the applicant as guardian of the minor without requiring any security, which was obviously improper. I can find no authority in the Act for making any such appointment as the Judge has purported to make.

The result is that we must set aside his order and direct the present certificate, if issued, to be given up. We will (as no objection is raised) treat the application as one referring to the estate of Gamna, and acting under section 7 (3) we grant a certificate to the petitioner as the person who would *primâ facie* have the best title in the absence of an adoption. Our justification for so acting is that the question of an adoption is obviously too intricate to be determined in these proceedings. The certificate will only be granted on the petitioner giving security under section 9, the amount and character to be determined by the District Judge. Each party will bear his own costs in the lower Court, but the respondent must pay the appellant his costs of this appeal. We do not interfere with the costs in Application 16.

RANADE, J.:—The District Judge appears in this case to have entirely misconceived the true character of the proceeding under Act VII of 1889. The preamble of the Act shows that it was intended to facilitate the collection of debts due to deceased persons and to afford protection to parties paying such debts to the representatives of such persons. A person who claims the right to be representative of a deceased owner of the debt is empowered by section 6 to make the application, and section 7, clause 3, provides that when the Court cannot decide the right to the certificate without determining questions of law or fact,

which seem to it to be too intricate and difficult for determination in a summary proceeding, it may grant the certificate to the applicant if he appears to be the person having *primâ facie* the best title thereto, and clause 4 provides that where there are more applicants than one, it is to decide who has the greatest interest and who is most fit; and section 9 provides that when the inquiry is held under section 7, clause 3 or clause 4, security shall be taken from the person to whom the certificate is granted. The District Judge seems to have lost sight of these provisions of sections 6, 7 and 9. He allowed the petitioner, Moti Chatraji, to apply for a certificate under this Act, not for himself, but as a guardian of a minor son of his, named Virchand, who was given in adoption to Bai Dahi, widow of one Gamna Karmaji, and who was the owner of the debts for which the certificate is claimed. Such an application by an alleged guardian of a minor adopted by the deceased is not contemplated by section 6, clause (*d*), which only permits the petitioner who claims the right for himself to apply.

As regards the nature of the inquiry the Judge states that thirteen witnesses were examined on behalf of the applicant, and five witnesses were examined on behalf of the opponent whose application for many more witnesses was refused by the Judge. The questions at issue related to the proof of two disputed adoptions, both parties claiming to be adopted by Bai Dahi. The adoption dispute involves by-issues of the performance of ceremonies and the authority to Bai Dahi to make adoption. Thus it seems that the inquiry involves intricate and difficult questions of law and fact, which could not be summarily disposed of, and the Judge ought to have decided the *primâ facie* right of the applicant under clause 3, or under clause 4, as between the applicant and the opponent. The District Judge treated the case as though it was a regular suit, and decided in the minor applicant's favour, and passed the order in favour of Moti, the minor's natural father, as guardian, without taking security as provided by section 9. The inquiry by reason of this mistake was prolonged for nearly two years. In all these points the Judge appears to have misconceived the true scope of the inquiry, and his order cannot be therefore supported as it stands.

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The question of the rival claims of the parties who profess to be adopted by Bai Dahi cannot be disposed of in an inquiry under this Act, and must be reserved for future litigation by the persons interested. Fortunately in this case Moti Chatraji, the petitioner, is admittedly the natural heir of the deceased. Karma had two sons, Chatra and Gamna, and Moti is Chatra's son; he is thus the nephew of Gamna and Bai Dahi. Independently of the alleged adoptions he would be the heir. The opponent admitted that Moti was nephew and he himself was a more distant relation. The certificate application was made by Moti, and under the circumstances the District Judge might have treated him as applicant in his own right and granted him the certificate as the nearest natural heir. We now make that order by varying the decision of the District Court, and grant the certificate to Moti Chatraji, and under the circumstances remand the case to the District Court to fix the security to be required to be taken from Moti Chatraji for rendering account of the debts &c. received by him. The costs in the lower Court should be borne by each party, and in this Court the appellant should recover his costs from the respondent.

*Decree varied.*

## APPELLATE CIVIL.

*Before Mr. Justice Candy and Mr. Justice Whitworth.*

1901.

*January* 14.

RAMBHAT (ORIGINAL PLAINTIFF), *v.* SHANKAR BASWANT (ORIGINAL DEFENDANT).*

*Jurisdiction—Defendants non-resident foreigners—Cause of action arising within jurisdiction—Civil Procedure Code (Act XIV of 1882), section 17, explanation III—Letters Patent, clause 12—Small Cause Courts Act (IX of 1887), section 18.*

Under the Civil Procedure Code (Act XIV of 1882) British Courts are empowered to pass judgment against a non-resident foreigner provided that the cause of action has arisen within the jurisdiction of the Court pronouncing the judgment.

* Reference No. 21 of 1900.

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REFERENCE by Ráo Bahádur Gangadhar V. Limaye, First Class Subordinate Judge of Belgaum, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The question referred was whether the Court at Belgaum had jurisdiction to try this suit, the cause of action having arisen at Belgaum, but the defendants being residents and subjects of a foreign State, namely the State of Sángli.

The suit was brought to recover Rs. 500 due on a promissory note admittedly executed by the defendants' father at Belgaum, and in respect of which several payments had been made at Belgaum.

The opinion of the referring Judge was that he had no jurisdiction, but he referred the point to the High Court.

*N. P. Patankar* (*amicus curiæ*) for the plaintiff:—

Under section 17 of the Civil Procedure Code, the Court at Belgaum had jurisdiction to entertain the suit as the cause of action arose there. We are bound by the Civil Procedure Code, and if, under its provisions, a Court can take cognizance of a suit, it must do so, even though in doing so it may violate the rules of international law.

The defendants having submitted to the jurisdiction by appearing before the Court, it is not open to them to plead that a decree cannot be passed against them as they are subjects of a foreign State—*cf.* Presidency Small Cause Courts Act (XV of 1882), section 18, *Girdhar* v. *Kassigar*,[1] *Ram Rarji* v. *Pralhaddas*,[2] *Bhaurao* v. *Lakshmibai*.[3]

*N. A. Shiveshvarkar* (*amicus curiæ*) for the defendants:—

It is not disputed that Sángli is a foreign State and that it has an independent civil jurisdiction. The question is whether a British Court has jurisdiction to entertain an action *in personam* against the subject of a foreign State? The answer to this question depends upon the consideration of two points, namely, whether the Court is judicially competent to entertain the action and how far its judgment would be effective. Its competence is to be determined by section 17 of the Civil Procedure Code and

(1) (1893) 17 Bom. 662. (2) (1895) 20 Bom. 133.
(3) (1895) 20 Bom. 607.

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the effectiveness of the judgment by reference to the rules of Private International Law. An effective judgment is a decree which gives to the person who obtains rights under it an actual and not merely a nominal right, that is, a right which, if aided by the sovereign whose Court has delivered judgment, he can enforce. (Dicey on Conflict of Laws, pages 37-39.) The State of Sángli being admittedly a recognized foreign State, the decree which a British Court might pass would be treated a nullity, creating no obligation and entitled to no respect. One of the essentials thus being wanting, the British Court has no jurisdiction.

Section 17 of the Civil Procedure Code should be interpreted and acted upon consistently with the rules of International Law. The plaintiff must sue in the Court to which the defendant is subject at the time of the suit. *Gurdyal Singh* v. *Rája of Faridkot*,[1] *Christien* v. *Delanney*,[2] *Kessowji* v. *Khimji*,[3] International Law by Sir Robert Phillimore, vol. IV, section 891. Merely appearing before the Court and protesting against the jurisdiction does not amount to submission to jurisdiction—*Parry and Co.* v. *Appasami*.[4]

CANDY, J.:—The facts which have given rise to this reference are these:—

Shankar, a resident in Marihal, a village of the Sángli State, borrowed a sum of money from the plaintiff, a resident of Belgaum, and passed a document (Exhibit A), which has been termed a promissory note. It is, strictly speaking, merely a receipt. No doubt there is an implied promise to pay the debt, and it has been found as a fact by the Subordinate Judge that the document was passed and part of the debt has been repaid at Belgaum, and that the cause of action arose within his jurisdiction.

Having regard to explanation III of section 17 of the Civil Procedure Code, it must be taken that in the present suit brought by the plaintiff against the sons of the deceased Shankar to recover the balance of the debt, the cause of action arose within the local limits of the jurisdiction of the Subordinate Judge of Belgaum.

(1) (1894) 22 Cal. 222.
(2) (1899) 26 Cal. 951.
(3) (1888) 12 Bom. 507.
(4) (1880) 2 Mad. 407.

Defendants were summoned through the Sángli authorities, and one of the defendants appeared by pleader and contested the jurisdiction of the Subordinate Judge to try the suit. This is the question which has been referred to us under section 617 of the Civil Procedure Code (XIV of 1882).

If we are to be guided by the current decisions of the Bombay High Court, then, no doubt, the question must be answered in favour of the Subordinate Judge's jurisdiction. In *Kessowji* v. *Khimji*[1] the point decided had reference to clause 12 of the Letters Patent, which empowered the High Court in the exercise of its ordinary original civil jurisdiction to try suits (not being suits for land, &c.) —

(*a*) if the cause of action shall have arisen within the local limits of such jurisdiction; or

(*b*) if the defendant at the time of the commencement of the suit shall dwell, or (2) carry on business, or (3) personally work for gain within such limits.

Clause (*a*) did not require consideration, as it was admitted that the cause of action arose wholly without the jurisdiction. It was also admitted that the defendant did not dwell or personally carry on business (work) for gain within its limits. Scott, J., held that he was bound to give the word "defendant" in the above clause a double meaning, *i. e.* a limited sense as regards jurisdiction over those who carry on trade (*b* [clause 2])—and a general sense, inclusive of foreigners and British subjects, in its application to those who personally work for gain or dwell (*b* [3] and [1]). It was clearly admitted throughout the judgment that if the cause of action arose within the local limits of the jurisdiction, then the Court would have jurisdiction even though the defendant might be a non-resident foreigner. This had been the view taken by Bayley, J., in 1872 in *Hargopal* v. *Abdul*[2] in which the amount sued for was the balance alleged to be due in respect of moneys lent in Bombay by the plaintiffs to the deceased Haji Mahomed Khan, a resident of Ajmere. Bayley, J., said: "An action might unquestionably have been brought against him in this Court in his lifetime, and his death by the act of God does not deprive his creditors of the right which by his contract with

(1) (1888) 12 Bom. 507. (2) (1872) 9 Bom. H. C. R. 429.

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them in Bombay they had acquired to have their claims against him or his estate wherever it might be situated, adjudicated upon in the High Court of Bombay."

The decision of Scott, J., above noted regarding the words "carrying on business," given in 1888, was virtually overruled by Sargent, C.J., and Starling, J., in 1893 in the case of *Girdhar* v. *Kassigar*,[1] with reference to section 18 of the Small Cause Courts Act (XV of 1882), which provided that the Small Cause Court should have jurisdiction '(*a*) when the cause of action has arisen within the local limits of the jurisdiction of the Small Cause Court (with the leave of the Court), or (*b*) when all the defendants at the time of the institution of the suit (1) actually and voluntarily reside, or (2) carry on business, or (3) personally work for gain within such local limits.' Sargent, C.J., held that the limited sense of the word "defendant" as regards (*b* [clause 2]) was not justified, and that it was a proper inference that the Legislature had directed the Courts to exercise jurisdiction over defendants who carry on business within the jurisdiction, even though they are non-resident foreigners. It would appear also from the whole tenor of the judgment that Sir C. Sargent treated it as clear that if the cause of action arose within the local limits of the jurisdiction of the Court, then there could be no doubt as to the power of the Court to try the suit.

This was the view taken by Farran, C.J., and Tyabji, J., in 1895 in the subsequent case of *Ram Ravji* v. *Prahladdas*,[2] in which it was said that the part of the cause of action arose within the local limits of the jurisdiction of the High Court. Sir C. Farran, C.J., said (pages 142-3):

> It has been, however, argued upon the authority of *Gurdyal Singh* v. *Rája of Faridkot*[3] that, admitting that part of the cause of action arose in Bombay, the Court has no jurisdiction over the defendant who is a subject of the Baroda State and a foreigner, inasmuch as before suit filed he had ceased to carry on business in Bombay and to be amenable to the jurisdiction of the High Court. The answer to this contention appears to us to be found in a passage of the judgment of the Privy Council itself. 'In a personal action .... a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, it is by International Law an

(1) (1893) 17 Bom. 662. (2) (1895) 20 Bom. 133.
(3) (1894) 22 Cal. 222; 21 I. A. 171.

absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation except (when authorised by special local legislation) in the country of the *forum* by which it was pronounced.' Except in the case of *Kessowji* v. *Khimji*,(1) where to escape from grave anomaly, one of the heads of the jurisdiction conferred on the High Court by clause 12 of its Letters Patent were read as though the words 'being a British subject' were inserted in it, it has been considered since the establishment of the High Court, that the several heads of jurisdiction specified in the clause were applicable to actions where a foreigner was a defendant. The number of suits which have been brought and without question decided upon that view of the law must have been very great. The judgment of the Court of appeal in *Girdhar* v. *Kassigar*(2) virtually overrules *Kessowji* v. *Khimji*,(3) and decides that the case of foreigners resident out of the jurisdiction but carrying on business within it, is not to be excluded impliedly from the purview of clause 12 of the Letters Patent. The reasoning upon which the decision is founded is directly applicable to the case before us. Thus we feel that we should be virtually overruling that decision if we were to accept the contention of the Counsel for the appellant. We do not, however, doubt its correctness, and willingly follow it. The plea to the jurisdiction therefore fails.

It is thus clear that Farran, C.J., having due regard to the decision of the Privy Council in the *Faridkot* case, held that the several heads of jurisdiction above noted (both [*a*] and [*b*]) specified in clause 12 of the Letters Patent are applicable to actions where a non-resident foreigner is a defendant. If that be so, then it is obvious that the same principle will hold good in regard to the corresponding heads of jurisdiction specified in section 17 of the Civil Procedure Code, 1882. To apply the words of Sir C. Farran, it has been considered, at least since the Civil Procedure Code of 1859 was enacted, that the several heads of jurisdiction specified in the section or sections relating to the jurisdiction of the Courts were applicable to actions where a foreigner is a defendant. The number of suits which have been brought, and without question decided upon that view of the law, must have been very great. Having regard to the nature of the numerous suits which are tried on the original side of the Bombay High Court, and in the Presidency Small Cause Court at Bombay, it is no exaggerated language to say that if the proposition now put forward on behalf of the defendants in the present case is correct, a large portion of the business of those Courts will be

(1) (1888) 12 Bom. 507. (2) (1893) 17 Bom. 662.
(3) (1888) 12 Bom. 507.

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taken away. Every one conversant with the litigation in the city and island of Bombay knows how numerous are the suits in which the defendants are residents of Kutch or Káthiáwár, and jurisdiction is assumed over them simply on the ground that in the suits in which they are defendants the cause of action has arisen in Bombay.

As was stated by Lord Esher, M.R., in *Companhia de Mocambique* v. *British South Africa Company*,(1) and by James, L.J., in *ex-parte Blain*,(2) quoted by Sir C. Sargent at page 666 of Indian Law Report 17 Bom., if there is a "proper inference to the effect that the Courts are directed to exercise jurisdiction over non-resident foreigners, or if this is plainly implied," then the Courts must obey. Moreover (to again apply the language of Sir C. Sargent, idem, page 667,) in considering what was the true intention of the Legislature, it is right to bear in mind the special circumstances of many of the mofussil Civil Courts in this country, as regards the great number of non-British subjects who are constantly having transactions with British subjects, giving rise to causes of action within the jurisdiction of those Courts. In his referring judgment in the present case the Subordinate Judge remarks that a good deal of the litigation in his Court is connected with the residents of certain villages situate in the neighbourhood of Belgaum, belonging to the Native States of Sángli and Kurundvád, and in particular with the residents of the mercantile town of Sháhápur of the Sángli State. If the causes of action arising out of those transactions within the jurisdiction of the Belgaum Civil Courts cannot be adjudicated upon by the Belgaum Court, there can be no doubt that those mercantile transactions will be practically crippled.

It may well be doubted whether it would be correct in such a case as this to say that the assertion of jurisdiction by the British Legislature is inconsistent with the comity of nations, or with the established rules of private international law. Is Sángli State a nation within the meaning of those rules? A reference to Aitchison's Treaties (3rd Ed.), vol. VII, page 186 *et seq.* shows that the Sángli Chief is one of the Southern Máratha Jaghirdárs. He is a first class Sardár under the British Govern-

(1) (1892) 2 Q. B. 358. (2) (1879) 12 Ch. D. 522.

ment. He is a descendant of Hari Bhat, the founder of the Patwardhan family, a Bráhmin who became the family priest of the Ghorpades of Ichalkaranji, and whose three sons rose to military commands under the first Peshwa and received grants of land on condition of military service. At the time of the Peshwa's overthrow Chintamanrao was the Chief of Sángli. An engagement was entered into with him (Aitchison, page 229) which bound him to dependence on the British Government, to whom all quarrels were to be referred. From 1873 to 1887, in consequence of the Chief's mismanagement, the affairs of the State were jointly administered by the Chief and a British officer appointed by Government. In 1888 the Chief was restored to full management on condition that (1) that he agreed to follow in all important matters the advice of the Political Agent for the Southern Marátha Country; (2) that he maintained the efficiency of the administration at its present high standard to the satisfaction of the Governor in Council; (3) that he exercised his power of appointing and dismissing the State Kárbhári only with the sanction of the Government, and that he gave a written agreement to the Political Agent to abide by these conditions.

Is it reasonable to apply to the territories of such a dependent Chief the comity of nations or the rules of private international law such as would be applicable between England and, say, France or Germany? It must be remembered that in one aspect the present case is the converse of the *Faridkot* case—*Gurdyal Singh* v. *Rája of Faridkot*.[1] Suppose the defendants in this case resided in Belgaum, but the contract giving rise to the cause of action had been made in Sángli territory, and the Sángli Court had assumed jurisdiction and passed a decree against the defendants, then the question would arise, if plaintiff brought a suit in Belgaum against the defendants on the foreign judgment, whether the British Courts could recognise such assumption of jurisdiction, and would treat the foreign judgment as a nullity. So too if the Subordinate should pass judgment in the present case against defendants, and plaintiff should bring a suit on that judgment in the Sángli Court, it

(1) (1894) 22 Cal. 223; 21 I. A. 171.

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may be said that the question would arise in the Sángli Court, whether such judgment should not be treated as a nullity. The question for our consideration is not whether the Belgaum Subordinate Judge can recognise a certain judgment of a foreign Court, or whether a foreign Court would recognise the judgment of the Belgaum Subordinate Judge if delivered against the defendants in the present case. So conversely in the *Faridkot* case the question was not whether the Faridkot Court had jurisdiction to pass the judgment it did, and not whether that judgment was valid within the Faridkot territory. The answer to both those questions were apparently in the affirmative. The sovereign of Faridkot, who combines in his own person both the executive and legislative functions of government, had specially authorised the Judge to try the case in question, and, it may be added, had of his own authority directed the adoption of the Indian Code of Civil Procedure, so far as they were applicable to his territory. But the question decided by the Privy Council in the *Faridkot* case was, whether the judgment though valid in the country of the *forum* by which it was pronounced, could be regarded as anything but a mere nullity in the Courts of another nation. That question was answered in the negative. It does not arise here.

The question for our consideration is whether the proper inference from the Code of Civil Procedure is that our Courts are empowered to pass judgment against a non-resident foreigner, provided that the cause of action has arisen within the jurisdiction of the Court pronouncing judgment. Sir C. Farran answered this question in the affirmative. We are not prepared to dissent from that authority. To answer the question in the negative would be to cause a cataclysm in the civil litigation of the Empire of British India, which could only be remedied by immediate legislation, and that only possibly in Parliament. The difficulties pointed out above in regard to Bombay and Belgaum do not exist in those places only. If the Civil Procedure Code must be taken as not empowering our Courts to pronounce judgment in cases where the cause of action arose within the limits of the jurisdiction of the Court pronouncing judgment, but the defendant is a subject of and resides in one

of the numerous Native States, which are throughout the length and breadth of this great continent to be found in more or less dependence on the British Government, then it is not in one or two isolated places that this view of the present law will have the most important consequences. In this view we are of opinion that it would be a serious thing to dissent from so strong a body of judicial authority as is shown by the current of decisions of this Court, and we accordingly answer the question put to us in the affirmative.

*Order accordingly.*

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## APPELLATE CIVIL.

*Before Mr. Justice Ranade and Mr. Justice Crowe.*

KRISHNA (ORIGINAL PLAINTIFF), APPELLANT, *v.* PARAMSHRI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1901. *January* 8.

*Hindu Law—Adoption—Dwyamushyayana adoption—Power of a Hindu widow to give away an only son in adoption.*

A Hindu widow can make a valid gift of her only son in adoption.

The power of giving and taking an only son in adoption in the *Dwyamushyayana* form is not confined to brothers, but may also be exercised by their widows.

*Lakshmappa* v. *Ramava*(1) explained and distinguished.

SECOND appeal from the decision of H. L. Hervey, District Judge of Kánara, confirming the decree of Ráo Sáheb V. D. Joglekar, Second Class Subordinate Judge at Kumta.

Devappa and Bomaya were separated Hindu brothers of the Sudra class.

Bomaya died, leaving a widow Shivamma and an only son Krishna (the plaintiff).

Devappa died without issue, but leaving a widow Parmashri (defendant).

In 1894 Parmashri sold part of the property left by Devappa to the second defendant for Rs. 200. The plaintiff was about to

* Second Appeal, No. 416 of 1900.

(1) (1875) 12 Bom. H. C. R. 364.

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file a suit to have this sale set aside when the village elders intervened and a settlement was effected in October, 1894, whereby the plaintiff was to pay the second defendant Rs. 200, and the latter was to give up the property which had been sold to him. The whole of the family property was then to be held in equal shares by the plaintiff and the first defendant, and on the first defendant's death her half share was to go to the plaintiff, who was then to become owner of the whole. The plaintiff was to become the son both of Devappa and Bomaya and was to perform the *shradh* of both. The plaintiff's mother accordingly gave him in adoption to the first defendant Parmashri.

Under this agreement the plaintiff paid Rs. 200 to the second defendant, but the latter did not give up the land he had bought from Parmashri. The plaintiff now sued to enforce the agreement of October, 1894, or to recover his Rs. 200 from the second defendant.

The Court of first instance did not go into the question whether the plaintiff's adoption was valid, but it held that the agreement should be enforced, and it passed a decree for the plaintiff.

On appeal the District Judge sent back the case for a finding upon the validity of the plaintiff's adoption. The lower Court found in favour of the adoption.

The District Judge, however, on appeal reversed that finding, and held that the adoption of the plaintiff was invalid as being the adoption of an only son given in adoption. On the authority of *Lakshmappa* v. *Ramava*[1] he was of opinion that it could not be presumed that the plaintiff's mother, a widow, had any implied authority to give him (an only son) in adoption.

The plaintiff appealed to the High Court.

*Shamrao Vithal* for appellant (plaintiff) :—The decision in *Lakshmappa* v. *Ramava*[2] is not applicable to the present case. The recent decision of the Privy Council in *Gurlingaswami* v. *Ramlakshmamma*[3] has altered the law as established in this Presidency and has recognized the validity of the adoption of an only son—*Vyas Chimanlal* v. *Vyas Ramchandra*.[4] The

(1) (1875) 12 Bom. H. C. R. 364.
(2) (1875) 12 Bom. H. C. R. 364.
(3) (1899) 22 Mad. 398 ; 26 I. A. 116.
(4) (1899) 24 Bom. 367.

Privy Council decision does not make any distinction between the powers of a father and a widowed mother to give an only son in adoption. The District Judge erred in holding that the widow required an express authority from her husband to give an only son in adoption. In this Presidency a widow's authority to give or take a son in adoption is always implied unless she is expressly prohibited by her husband—*Lakshmibai* v. *Sarasvatibai*.[1]

*G. N. Nadkarni* for respondents 1 and 2 (defendants 1 and 2):—The Privy Council decision in *Gurulingaswami* v. *Ramalakshmamma*[2] has effected no change in the old law, so far as the widow's power to give a son in adoption is concerned. She has no independent power to make a gift in adoption. Her power is delegated. She acts as the agent of her husband. The Privy Council decision applies only to the case of the adoption of an only son by his father. There can be no adoption, even in the *Dwyamushyayana* form, when the brothers are dead. Their widows are not competent to make such adoption.

*G. S. Mulgavkar* for respondents 3 and 5 (defendants 3 and 5).

RANADE, J.:—The parties to this suit are *Shudras*. Devappa and Bomaya were full brothers. The appellant-plaintiff is Bomaya's only son. Devappa left no issue, and respondent-defendant 1, his widow, adopted the plaintiff on the 10th of October, 1894, as a *Dwyamushyayana* son. An agreement was entered into at the time when this adoption was made. The parties to this agreement were the plaintiff and his natural mother Shivamma on one side, and on the other defendant No. 1 and defendant No. 2, to whom defendant No. 1 had sold part of the family property for Rs. 200 in April, 1894. Plaintiff desired to file a suit to have this sale, made by defendant 1 to defendant 2, set aside. The village elders intervened and effected the settlement represented by the agreement of October, 1894. In this agreement plaintiff undertook to pay Rs. 200 to defendant No. 2 on account of defendant No. 1. The property of Devappa and Bomaya was to be held in

(1) (1899) 23 Bom. 789. (2) (1899) 22 Mad. 398; 26 I. A. 116.

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equal shares by plaintiff and defendant 1. Defendant No. 1's interest, however, was only to last for her life, and on her death plaintiff was to be the sole owner of the entire property. Plaintiff was to become the son both of Devappa and Bomaya, and was to perform the *shradh* of both the fathers. Plaintiff's mother Shivamma accordingly gave him in adoption to defendant No. 1 in order that he might become the son of both the brothers, Bomaya and Devappa.

This is the principal substance of the agreement. The parties apparently did not carry it out, and plaintiff's present suit was brought to enforce the agreement, in respect of which he had paid Rs. 200 to defendant No. 2, but the latter had not given up possession of the lands sold to him by defendant No. 1.

The Court of first instance, without going into the question of the disputed adoption, decided that the alienation made by defendant No. 1 should be set aside, and the agreement enforced. In appeal the District Judge required the Court of first instance to record finding upon the questions of the proof and validity of the adoption.

The first Court decided both these points in the appellant-plaintiff's favour. The District Judge, however, while holding that the adoption was proved, decided that it was invalid as being of an only son given in adoption by the widow of Bomaya, plaintiff's natural father. The judgment shows that this finding was chiefly based on *Lakshmappa* v. *Ramava*[1] in which it was ruled that no implied authority can be presumed in favour of the gift of an only son made by the widow.

In second appeal Mr. Shamrao contended that the recent decision of the Privy Council—*Gurulingaswami* v. *Ramalakshmamma*[2]—had effected a change in the old law and the validity of the gift of an only son by his father must now be recognised, and this principle must be extended so as to validate the gift made by the widow under similar circumstances. The Privy Council ruling has been accepted by this Court in *Vyas Chimanlal* v. *Vyas Ramchandra*,[3] and the validity of an only son's adoption cannot

(1) (1875) 12 B. H. C. R. 364. (2) (1899) 22 Mad. 398; 26 I. A. 116.
(3) (1899) 24 Bom. 367.

now be questioned, whether the law of Mitákshará or the Mayukha prevails.

In *Lakshmibai* v. *Sarasvatibai*[1] it was ruled that in the absence of an express prohibition of the husband, there is always an implied authority to the widow to make a gift of his son in adoption.

Mr. Shamrao further contended that under these rulings of this Court and the Privy Council, his client's adoption by the respondent No. 1 was perfectly valid, more especially because it was that of a nephew taken in adoption as a *Dwyamushyayana* son. Lastly, it was urged that defendants Nos. 1 and 2, being parties to the agreement, were estopped from questioning the validity of their own acts.

Mr. Ghanasham, who appeared for the defendants Nos. 1 and 2, contended that the decision of the Privy Council in *Gurulingaswami* v. *Ramalakshmamma*[2] had not altered the law so far as the widow's power was concerned. He contended that the widow had no independent power to make a gift in adoption. Her power was dependent and delegated, and the decision in *Lakshmappa* v. *Ramava*[3] was not affected by the Privy Council ruling and the decisions of this Court which followed that ruling. These rulings only recognised the power of the father to give an only son in adoption, but it does not follow from them that the widow without the express authority from her husband can give an only son in adoption. As regards the *Dwyamushyayana* son, Mr. Ghanasham contended that this form of adoption was only permitted as between the fathers on both sides. There could be no *Dwyamushyayana* adoption when both the fathers are dead and only the widows remain behind. As regards the question of estoppel, it was contended that the District Judge had recorded no findings on that point.

We have thus set forth the contentions of both sides. It may be noted that even when the Courts were not disposed to favour the adoption of an only son, an exception was always made in respect of the validity of the *Dwyamushyayana* form of the adoption of an only son. It has always been regarded as an

(1) (1899) 23 Bom. 789. (2) (1899) 22 Mad. 398; 26 I. A. 116.
(3) (1875) 12 B. H. C. R. 364.

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unblamable form. The only objection urged on religious grounds against the adoption of an only son is obviated where the only son belongs both to the giver and the receiver. It does not thus come within the blamable forms in respect of which alone the widow's power to make a gift of an only son was regarded in *Lakshmappa* v. *Ramava* as one for which authority cannot be implied where it is not given. The decision in *Lakshmappa* v. *Ramava* must be restricted to those cases where the husband's gift would have been held blamable, and therefore the widow's power could not be implied. Now that the recent decisions have established the fact that the gift of an only son is not blamable, the implied effect ceases to be operative, and no restriction can be placed on the widow's power to make a valid gift of an only son.

It was, however, contended that the *Dwyamushyayana* form of an adoption can be made only between the fathers on both sides, and not between the widows as in the present case. No authority was cited in support of this view. The case of *Debee Dial* v. *Hur Hor Singh*,[1] referred to in *Lakshmappa* v. *Ramava*,[2] was not the case of *Dwyamushyayana* adoption. It was the case of a gift in adoption made by a widow of an ordinary character. The ceremonies prescribed in the *Dwyamushyayana* form of adoption are the same as in the case of an absolutely adopted son or a *Shudha Dattaka*. The only addition is of an undertaking or stipulation that the child should belong to both the giver and the adoptor. If an only son be given in adoption by a brother of the adoptor, Vasistha's prohibition of the gift of an only son is not violated. Nanda Pandit has indeed remarked that the gift of an only son is limited to the case of two brothers, but the Dattaka Mimamsa and the Dattaka Chandrika alike lay down that the *Dwyamushyayana* form of adoption is not confined to brothers, but is general in its application just as much as the case of a son begotten on a woman by other person than her husband is not confined to brothers. This is laid down in the *Mitákshará*. Indeed the presumption is that the husband will be more gratified than otherwise by the adoption of a nephew as in the present case. Mr. Mayne observes (section 132) that there is no objection to

(1) (1833) 4 Beng. S. D. 220. (2) (1875) 12 B. H. C. R. 364.

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the adoption of an only son in the *Dwyamushyayana* form, and refers to cases where such adoptions have taken place. In the southern districts of this Presidency such adoptions have not been rare—*Basava* v. *Lingangauda*.[1] On the whole, therefore, it appears to us that no objection can be taken to the validity of the adoption in this case, (1) because the ruling in *Lakshmappa* v. *Ramava* does not apply to *Dwyamushyayana* adoption; (2) because the recent rulings, which make the gift of an only son valid in the case of father, naturally justify a similar presumption of validity where the gift was made by the widow; (3) because the power of making *Dwyamushyayana* adoption is not confined to brothers only, but their widows may give and receive in adoption an only son.

We would therefore reverse the decision of the lower appellate Court and remand the case back to that Court for its decision on the remaining issues. Costs to abide the result.

*Decree reversed and case remanded.*

(1) (1894) 19 Bom. 428.

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## APPELLATE CRIMINAL.

*Before Mr. Justice Candy and Mr. Justice Whitworth.*

QUEEN-EMPRESS *v.* NARAYAN.*

1901. *January* 14.

*Evidence—Confession—Confession of an accused while in custody of the police—Duty of Magistrate when such confession is made—Sessions Judge—Duty of—Criminal Procedure Code (Act V of 1898), section 164 (3)—Evidence Act (I of 1872), section 24.*

When an accused person has been in custody of the Police and has made a confession, it is important that the Magistrate before recording such confession under section 164 of the Criminal Procedure Code (V of 1898) should ascertain how long the accused has been in custody. If there is no record of that fact, it is the duty of the Sessions Judge, before holding the confession relevant under section 24 of the Evidence Act (I of 1872), to send for the Magistrate and satisfy himself on the point.

* Criminal Appeals, Nos. 526 and 527 of 1900.

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APPEALS from the convictions and sentences recorded by H. L. Hervey, Sessions Judge of Kánara.

The two accused were charged with murder under section 302 of the Indian Penal Code (Act XLV of 1860).

Accused No. 1 was arrested by the Police on 11th June, 1900. On the 23rd of June he made a confession before a First Class Magistrate, which he subsequently retracted during the preliminary inquiry before the Committing Magistrate.

The Sessions Judge relying on this confession and on the evidence of Timaka, convicted both the accused of murder and sentenced them to transportation for life.

Against these convictions and sentences the accused appealed to the High Court.

*Branson* (with *Shamrao Vithal*) for accused No. 1:—The confession of accused No. 1 appears on the face of it to have been obtained by pressure and undue influence by the police. The accused was in police custody for ten or eleven days, and though there is no direct evidence on the point, it is impossible to believe that the accused made the confession voluntarily. The surrounding circumstances of the case clearly show that the confession was anything but voluntary. There is nothing to show that the Magistrate who took down the confession satisfied himself that the confession was voluntary, before formally recording it. Nor was the Magistrate examined on this point in the Sessions Court. The confession therefore is inadmissible. The rest of the evidence is wholly unreliable and cannot sustain the conviction.

*Robertson* (with *N. G. Chandavarkar*) for accused No. 2:—The confession of accused No. 1 is self-exculpatory. It cannot therefore be taken into consideration as against accused No. 2.

Ráo Bahádur *V. J. Kirtikar*, Government Pleader, for the Crown:—The confession recorded in this case satisfies the requirements of section 164 of the Criminal Procedure Code (Act V of 1898). It bears the requisite memorandum of the Magistrate at the foot, and it must be presumed, until the contrary is established by clear evidence, that it was duly recorded in the manner required by law. It has been held that the omission of

the Magistrate to record the circumstance that the accused was not in the custody of the police does not invalidate a confession —*Imperatrix* v. *Barku*[1]; *Queen-Empress* v. *Anga*.[2] Under section 24 of the Evidence Act (I of 1872), it lies on the accused to prove that the confession was the result of inducement, threat or promise &c. There is ample evidence in the case corroborating the confession in material respects. It can therefore be taken into consideration against accused No. 2 also.

CANDY, J.:—We concur with the Sessions Judge that the evidence against the two accused consists solely of Timakha's deposition and the confession of the first accused, and that it has to be seen whether these statements can be accepted as true and voluntary.

First as to the confession. From the very first the relatives of Timakha's husband were suspected of having caused the death of Biranna, who had been Timakha's lover. The criminal intimacy was notorious, and the fact of the corpse having been apparently with set purpose placed on the verandah of Timakha's mother's house, pointed to the motive which the murderers were not anxious to conceal. Directly the police came upon the scene on the 11th June, a few hours after the murder, the houses of the relatives of Timakha's husband, including the present accused, were searched to see if anything suspicious could be found, but without success. Of course the difficulty with which the police were confronted was to discover which of the relations of the accused were implicated in the murder. According to the police records, the police arrested accused No. 1 on the 21st June at 10 A.M. at Bargi, a village three miles from Hiregutti (the scene of the murder) and nine miles from Kumta. The story told by the Head Constable Vithalrao as to how by chance he happened to meet the accused on the road going from Hiregutti to Bargi, and how the accused voluntarily made a full disclosure of the facts regarding the murder, is, on the face of it, absurd, and is moreover proved by evidence in the case to be absolutely false. It was rightly disbelieved by the Sessions Judge. It is obvious that accused No. 1, having from the first,

(1) (1891) Bom. Cr. Rulings, No. 3 of 1891. (2) (1898) 22 Mad. 15.

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*i. e.* the 11th June, been practically under arrest, was purposely sent from Hiregutti, where the sympathy of the villagers was with the accused persons, to Bargi, where it was thought that the accused would be more ready to confess. The police papers purport to show that accused No. 1 was arrested at Bargi on the 21st June at 10 A.M., that is ten days after he had really been arrested. It is difficult to understand why he was detained at Bargi on the 21st; possibly it was in order that the Chief Constable might see him. (The Chief Constable deposed that he left Hiregutti for Gokarn on the 21st, returned to Hiregutti that evening; saw accused No. 1 at Bargi that night, and arrested accused No. 2 and Mahadu the next day.) But then there is no explanation why accused No. 1 was not examined by the Magistrate at Kumta till the 23rd. If sent off from Bargi on the morning of the 22nd, he must have reached Kumta by 10 A.M. on that day, and that is the time of the arrival before the Magistrate as given in the criminal return.

It is much to be regretted that there is nothing on the record showing in what way the Magistrate at Kumta carried out the provisions of section 164 (3) of the Criminal Procedure Code, which forbid a Magistrate to record a confession *unless*, upon questioning the person making it, he has reason to believe that it was made voluntarily. No doubt there is the usual formal certificate at the foot of the record; but in a case like this, in which the confessing accused had been for ten days in detention by the police, obviously the first question which a Magistrate should put in order to satisfy himself that the confession will be a voluntary one, is, how long has the accused been in the custody of the police? Possibly in this case the Magistrate did so question the accused before recording the confession, though he did not write down such questions and answers. But considering that there was no record of the questioning, it was the duty of the Sessions Judge, before holding the confession to be relevant under section 24 of the Evidence Act, to have sent for the Magistrate and satisfied himself on the point. We entirely agree with the directions of Government (Government Resolution, Judicial Department, No. 1333, 27th February, 1886, a copy of which is on the files of the Sessions Judge) that in a case of this

nature "it is the duty of the Court to inquire very carefully into all the circumstances under which the confession was taken, *and particularly as to the length of time during which the accused person was in custody.*"

In the present case the Committing Magistrate in the committal proceedings did not formally examine accused No. 1, or ask him to explain the circumstance of the confession. But it is clear from the proceedings that the accused did retract his confession, and (as usual) pleaded ill-treatment at the hands of the police. Many Judges and Magistrates, as well as accused persons, think that a confession cannot be irrelevant under section 24 of the Evidence Act, unless it can be alleged that there was torture, leaving marks of personal violence. This is a mistake. The confession is irrelevant if the making of it appears to have been caused by any inducement, threat, or promise, &c. Now what are the facts here, and what is the natural inference from those facts? The most important fact (as shown in the directions of Government above quoted, with which we concur) is the length of time during which the accused person was in custody. As shown above, accused No. 1 was virtually in custody from the 11th June. He made his "confession" to the Magistrate on the 23rd June. Is it reasonable to suppose that during all that time no pressure was put upon the accused by the police to induce him to "confess"? The Sessions Judge says: "My belief is that accused No. 1, finding himself under close and continuous observation—if not detention—by the police, and knowing that the whole village was aware of his guilt, felt impelled to make a clear breast of the matter." But if the whole village was aware of his guilt, that must have been from the first, or at least from the 13th June, when Timakha is said to have made her statement to the police and mentioned the name of accused No. 1. But accused No. 1 did not make his confession to the Magistrate till ten days after Timakha is said to have implicated him. As the Sessions Judge says, it is impossible to believe that the police were not attempting to get a confession from the accused, and we are unable to resist the conclusion that it was improperly induced and therefore was irrelevant, and must be excluded from consideration.

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There remains the evidence of Timakha. She was the only person in the village who would be likely to know anything about the murder, and, no doubt, she was questioned by the police on the 12th, though they falsely deny that fact. On the 13th she is said to have made a statement implicating the two accused and Mahadu, and on the 14th she showed the place near the haystack where she said she was sitting with the deceased when he was attacked. It is to be remarked that she was not then sent to the Magistrate for her statement to be recorded by the Magistrate under section 164 of the Criminal Procedure Code. The Chief Constable deposed in the Sessions Court: "I sent Timakha up before the First Class Magistrate, Kumta, who recorded her statement. I did this to prevent her being tampered with." But the record of the case shows that she was not sent to the Magistrate till the 2nd July. Accused No. 1 having, it is said, made his confessional statement to the police on the 21st June, the Chief Constable arrested accused No. 2 and Mahadu on the 22nd June, apparently at Hiregutti, where he was on that date conducting the inquiry and where were those accused persons. Why the police papers and the Magistrate's criminal return should show the arrest of accused No. 2 and Mahadu at 6 P.M. on the 22nd at Kumta is extraordinary. They could not have reached Kumta unless they were taken there in custody by the police.

The next point to be noticed is that on the 23rd June these two accused persons were put before the First Class Magistrate at Kumta, and ten days' time was asked for by the Chief Constable to complete the police enquiry. The Magistrate granted five days' time, and sent those two accused persons back into the custody of the police. Accused No. 1 having made a confession before the Magistrate on the 23rd June, was kept by the Magistrate in his own lock-up and was not sent back to the police. But it is difficult to see what further legitimate police inquiry was possible for which the presence of accused No. 2 and Mahadu was necessary. There was no property to be produced. It is noteworthy that the Chief Constable apparently made no attempt to produce Timakha before the Magistrate on 23rd June. Having obtained five days' time, he on 29th June (*i. e.*

after six days, one day possibly being counted for the journey) sent the case to the Magistrate. In the criminal return the entry is that accused No. 2 and Mahadu arrived before the Magistrate at 3 P.M. on the 29th. But in the reasons of delay recorded by the Magistrate, and attached to his return, it is stated that the accused were brought before the Magistrate on the 2nd July, and that the case was "postponed for the 9th as the Magistrate had to go to Honávar on some urgent duty under the orders of the District Magistrate." However, on the 2nd July the Chief Constable sent Timakha under the charge of a Constable to Honávar (apparently this was done after the Magistrate had formally postponed the case at Kumta and himself had gone to Honávar) with a memorandum saying that he had secret information that attempts were being made to tamper with the prosecution witnesses, and he requested that Timakha, a principal witness, might be examined under section 164 of the Criminal Procedure Code. This was accordingly done at Honávar, and the statement is recorded as Exhibit 9 in the Sessions Court. Her further deposition before the Magistrate on the 23rd July is No. 10, and her deposition before the Sessions Judge is No. 8. The question is whether her statements in those depositions are sufficient on which to base the convictions of the two accused.

We regret that after careful consideration we can come to no other conclusion than that it would be unsafe to base a conviction solely on Timakha's testimony. We must put aside her "realistic account of the appearance of the body" of the deceased when she went to her mother's door in the early morning of the 11th June. That may be quite true; but it has no connection with the alleged facts of the murder. Nor need we take into consideration any inconsistencies or slight discrepancies which may have arisen from the fact that she, a woman of bold demeanour, plainly resented close cross-examination by the pleader for the defence. The question is, can we accept her statement that she witnessed the murder? The Sessions Judge had no doubt that her desire was to avenge the murder of her lover, and that she was only kept from speaking at the first by her reluctance to proclaim her own shame and to bring

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ruin upon her husband's family. But she must have well known that her criminal intimacy with Biranna was notorious, and she certainly had no affection for her husband's family, who, according to her account, treated her badly. It is remarkable that in her statement before the Magistrate, recorded on the 2nd July, she stated that the accused who first assaulted Biranna and held him fast was Mahadu; and that agrees with the statement of the first accused. In her deposition recorded on the 11th July she said the first one who came was Narayan (accused No. 2). This was also the statement she made in the Sessions Court. This is not a slight discrepancy. Then is it likely that she would have been sitting for an hour or so with Biranna beside the stack, and that she would have been surprised there? Possibly she has invented this part of her statement and the story of the state of her health at the time, in order to avoid the admission that she was caught actually in bed with Biranna, the truth being that Biranna bolted when discovered sleeping with Timakha, and that he was overtaken near the haystack and strangled there. But this is more or less a surmise; and the difficulty is to reject part of Timakha's deposition and accept the rest. It is impossible to resist the suspicion that she did not witness the murder at all. If from the first, in natural indignation at the cruel death which her lover had met with, she had frankly told in a consistent story what she had seen, her testimony alone might have sufficed for conviction. As it is, we feel that the only safe verdict is that arrived at by the assessors. The Government Pleader contended that there was no ground for the suggestion that some other lover of Timakha might have killed Biranna, but he omitted to notice that besides the assertion of witness No. 1 (brother of Biranna), the Chief Constable himself, who conducted the investigation, deposed that he suspected Mahadu Deobhari.

Having regard to the above facts, we must reverse the convictions and sentences, and direct the accused to be acquitted and discharged.

*Convictions and sentences reversed.*

# APPELLATE CIVIL.

*Before Mr. Justice Candy and Mr. Justice Whitworth.*

SHAMSING (ORIGINAL DEFENDANT), APPELLANT, *v.* SANTABAI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1901. *January 18.*

*Hindu Law—Adoption—Gift of a son in adoption by a Hindu convert to Mahomedanism—Validity of such adoption.*

A Hindu father does not lose his capacity to give his son in adoption by reason of his conversion to Mahomedanism.

*Quære*, whether this holds good in the case of Brahmans, among whom the *Datta-homa* ceremony is necessary.

Plaintiff, a Rajput, whose natural mother was dead and whose natural father had become a convert to Mahomedanism, was given in adoption by his uncle to whom the natural father had given the necessary authority.

*Held*, that the adoption was valid.

SECOND appeal from the decision of E. M. Pratt, District Judge of Sholápur-Bijápur, varying the decree of Ráo Bahádur Mahadeo Shridhar, First Class Subordinate Judge at Sholápur.

One Umravsing, a Rajput, died in 1886, leaving behind him a widow and also two daughters, Santabai and Parvatibai, who were the plaintiffs in this suit.

The defendant was adopted by Umravsing's widow. At the time of his adoption defendant's natural father had become a convert to Mahomedanism and his natural mother was dead. But he was given in adoption by his uncle to whom the natural father had given the necessary authority.

In 1896 the plaintiffs brought the present suit to set aside the defendant's adoption as being illegal and invalid, or in the alternative to recover possession of certain property given to them under a deed of gift executed by defendant and his adoptive mother.

The Subordinate Judge held that the adoption was valid. He awarded the plaintiffs' claim in so far as it was based on the deed of gift, and rejected the rest of their claim.

In appeal the District Judge held that the defendant's adoption was illegal on the ground that a Hindu convert to Mahomedan-

* Second Appeal, No. 513 of 1900.

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ism had no authority to give his son in adoption or delegate such authority to any other person. He therefore awarded the whole of the plaintiffs' claim.

Against this decision defendant preferred a second appeal to the High Court.

*S. S. Patkar* for appellant (defendant) :—The lower Appellate Court has found as a fact that the adoption was made. The only question therefore is whether it is valid. The conversion of the natural father to Mahomedanism did not deprive him of his authority to give his son in adoption. A father does not lose the guardianship of his son by reason of his conversion. He is not civilly dead, and by Act XXI of 1850 he does not lose his rights by conversion—West and Bülher on Hindu Law (Third Edition), pages 907, 951 and 1079; Steel on Hindu Law, pages 43 and 182. The right of giving a son in adoption is an act of guardianship — *Panchappa* v. *Sanganbasawa*[1]; *Kanahi Ram* v. *Biddya Ram*[2]; *Muchoo* v. *Arzoon*.[3] The father being thus competent after his conversion to give his son in adoption, he could delegate to his brother the duty of making the actual gift of the boy—Mayne on Hindu Law, page 167, Third Edition; *Vijiarangam* v. *Lakshuman*[4]; *Venkata* v. *Subhadra*[5]; *Subbarayar* v. *Subbammal*.[6]

*G. S. Mulgaokar* for respondents (plaintiffs) :—The adoption is not valid under Hindu law. Act XXI of 1850 applies to questions of inheritance and succession to property. It does not apply to the present case. Adoption under Hindu law is not purely a secular act. It is also a religious act. Assuming that no religious ceremonies were necessary in the present case, the parties being Rajputs, still the act of adoption is none the less a religious act. Consider what is the effect of an adoption. Adoption entitles one to inherit in the adoptive family because the adoptee becomes a member of that family. It has the effect of

(1) (1899) 24 Bom. p. 89 at p. 91.
(2) (1878) 1 All. 549.
(3) (1866) 5 W. R. 235.
(4) (1871) 8 Bom. H. C. (O.C.J.) 244 at p. 257.
(5) (1884) 7 Mad. 548.
(6) (1898) 21 Mad. 497.

changing the *gotra* of the adopted son and he in fact ceases to exist as a member of his natural family. His connection with the latter is completely severed. He need not perform *shradhas* for his natural parents but only for the adoptive parents. The question then is whether an act which has this effect can be performed by a father who is a convert to Mahomedanism, either by himself or by an agent. If he can do it himself, then we do not contend that he cannot do it by an agent. But he cannot do it himself, because by conversion he becomes a *patita*. He no longer remains a father of his Hindu sons for the purposes of religious acts and the effect of adoption is religious as it changes the *gotra*. No doubt the effect of Act XXI of 1850 is to maintain the relation of father and son, but that is for the purpose of guardianship. For religious purposes the Hindu children of a convert are orphans. They cannot be given away in adoption by one who is dead in the eye of Hindu law and religion. Act XXI of 1850 is only an enabling Act. It removes in a sense the disability consequent on conversion; that is to say, it retains to a convert *purely* civil rights. But religious disabilities are not affected by the Act. We therefore submit that the adoption is invalid.

CANDY, J.:—The question for consideration is whether the plaintiffs' adoption is valid. At the time of the adoption his natural mother was dead and his natural father had become a convert to Mahomedanism. He was therefore given in adoption by his uncle, whom the Mahomedan father had authorised in that behalf.

The District Judge held that the natural father could not then delegate authority, because he had by becoming a Mahomedan ceased to be governed by Hindu law, and thus he could not give, and consequently could not authorise the giving.

It is not denied that if the father was competent to give the son in adoption, then he was competent to delegate the authority to his brother. As Mr. Mayne puts it (Sixth Edition, page 257): "Where the necessary sanction has been given by an authorised person, the physical act of giving away in pursuance of that sanction may be delegated to another." And Mr. Justice West said in *Vijiarangam* v. *Lakshuman*[1] (page 257) :—"The Hindu law re-

(1) (1871) 8 Bom. H. C. R. 244 (O. C.).

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cognises the vicarious performance of most legal acts; the object of the corporeal giving and receiving in adoption is obviously to secure due publicity (Colebrook's Digest, Book V, Text 273, Commentary,) and Yeshwada's employing her uncle to perform this physical act, which derived its efficacy from her own volition accompanying it, cannot, we think, deprive it of its legal effect."

But the position taken for the defendant in the present case is that the father having become a Mahomedan was not an "authorized" person: his act of giving his son in adoption would not be "legal"; he was, by his renouncement of the Hindu religion, in Hindu law dead, and his son was an orphan, and so could not be given at all in adoption.

That was the view apparently adopted by the District Judge. He held that in matters of adoption, law and religion must be inseparable, and therefore, when the father ceased to be a Hindu, his power of giving a son in adoption ceased also. If that is the correct view, then Act XXI of 1850 will have no application. For though the effect of that Act is said to be that degradation or exclusion of caste, from whatever cause it may arise, is absolutely immaterial in all cases where, except for the Act, it would have debarred a person from enforcing or exercising a right, on the other hand where there are circumstances which, independent of all consideration of caste, create a disability under the Hindu law, the fact that degradation from caste follows upon the disability, leaves it just where it was before; the disability is not removed, because the degradation is inoperative (Mayne, Sixth Edition, page 781). So here it is contended that a man who is no longer a Hindu cannot, from the very nature of the case, give his son in adoption; it is not the case of any law or usage inflicting on him forfeiture of the right of giving his son in adoption by reason of his renouncing the Hindu religion, but it is the case of his being absolutely incapable of joining in the Hindu rite of adoption. We are unable to concur with this contention.

In *Panchapa* v. *Sanganbasawa*[1] Mr. Justice Parsons remarked: "It seems almost useless to refer to Hindu texts for assistance in the case of a status, the existence of which they never contem-

(1) (1899) 24 Bom. 89 at p. 91.

plated. It is, however, I think clear that the power to give in adoption was only conferred upon the father and mother, because they were the owners and natural guardians of their son, and it follows that if the mother should lose that position, then her power to give in adoption would be lost also."

That was a case which came under Act XV of 1856, section 3 of which declares that the effect of remarriage is (except under certain circumstances) to deprive the mother of her right of the guardianship of her children. But there is no such statute applying to the present case. On the contrary, it has been expressly ruled that under Act XXI of 1850 the inherent right of a Hindu father to the custody of his children, not only as guardian by nature, but by nurture is a right which is preserved to him, even though he has renounced the Hindu religion—*Muchoo* v. *Arzoon*[1] and *cf. Narayen* v. *Luxmeebaee*.[2] Adoption may be regarded as a civil transaction as well as a religious ceremonial. If civilly the father is competent to give, he is equally competent to sanction the giving. Were the parties here Brahmans and not Rajputs, and *Datta-homa* essential, then possibly the father after becoming a Mahomedan could not sanction his brother to be present at the giving during the *Datta-homa* ; but the point does not arise here. The question is really narrowed to this : if the father is not civilly dead, if he is still the guardian of his son, why should he not be able to exercise his volition and sanction his son being given in adoption according to the Hindu religion ? The son is still a Hindu : he is one who may be taken in adoption. We see no reason why the adoption should be treated as invalid.

We are unable to understand the District Judge's remark that "if a convert to Mahomedanism could give his Hindu sons in adoption, he would be enabled to divest them of their share in the family property which had vested in them prior to his conversion." The remark is equally true, even though the father may not have renounced the Hindu religion.

We accordingly reverse the decree of the District Judge and restore that of the Subordinate Judge. Plaintiffs must pay the defendants' costs in the District and High Courts.

*Decree reversed.*

(1) (1866) 5 Cal. W. R. 235. (2) (1850) 1 Morris Sel. Rep. (1850-51), p. 61.

# APPELLATE CIVIL.

*Before Mr. Justice Whitworth, on reference from Mr. Justice Ranade and Mr. Justice Crowe.*

1901. *January* 21.

SADASHIV (ORIGINAL DEFENDANT No. 2), APPELLANT, *v.* RAMKRISHNA (ORIGINAL PLAINTIFF), RESPONDENT.*

*Assessment—Land revenue—Suit for arrears of assessment—Limitation Act (XV of 1877), articles 110 and 120.*

The term "rent" is used in the Land Revenue Code (Bombay Act V of 1879) only with reference to those superior and inferior holders between whom the relationship of landlord and tenant subsists.

Plaintiff was the *Inámdár* of a certain village. Defendant held certain lands in the said village, but he was not placed in possession thereof either by the plaintiff or his predecessor in title under any agreement. Plaintiff sued to recover from the defendant five years' arrears of assessment. Defendant contended that plaintiff was not entitled to claim arrears for more than three years.

*Held*, that the suit was governed by article 120 and not 110 of the Limitation Act (XV of 1877), the relationship between the parties being that of superior and inferior holder and not that of landlord and tenant.

SECOND appeal from the decision of J. J. Heaton, District Judge of Násik, confirming the decree of Ráo Sáheb G. R. Gokhale, Second Class Subordinate Judge of Pimpalgaon.

Plaintiff was an *Inámdár* of the village of Kothure in the Násik District.

In 1897 plaintiff sued to recover arrears of assessment of certain lands held by defendant No. 2, through defendant No. 1, for five years before suit. Defendant No. 1 did not contest the claim.

Defendant No. 2 contended *inter alia* that the plaintiff was not entitled to claim more than three years' arrears of assessment.

The Court of first instance awarded the whole of the plaintiff's claim, holding that the suit was governed either by article 120 or article 132 of the Limitation Act (XV of 1877).

* Second appeal, No. 414 of 1900.

In appeal this decision was upheld by the District Judge, who held that the suit was governed by article 120 of the Limitation Act.

Against this decision defendant No. 2 preferred a second appeal to the High Court.

*D. A. Khare* for appellant (defendant 2) :—The suit is governed by article 110 of the Limitation Act. The suit is really one for arrears of rent. The relation between the parties is that between a landlord and a tenant. The Inámdár is an alienee of the land revenue. He has succeeded to all the rights of the Government in the alienated village, and although we were not put in possession by the Inámdár himself, we came in under Government through whom the Inámdár claims. The claim for more than three years' arrears of rent is time-barred.

There was no appearance for respondent.

RANADE, J. :—The principal point in dispute in this appeal relates to the question of limitation. The suit was brought by the Inámdár-plaintiff to recover five years' assessment in respect of some lands said to have been held by defendant 2 through defendant No. 1. Defendant No. 1 did not appear.

Defendant 2 pleaded that plaintiff's claim for the first three years was time-barred, and that he was in possession only of three lands, the other two lands being held by defendant No. 1. On the point of limitation defendant 2 urged that the claim for the first three years was time-barred by articles 62, 110 or 115. The Court of first instance held article 132 or 120 applied, and it awarded the claim for all the five lands as they stood in defendant No. 2's kháta, and he was therefore, under section 136 of the Land Revenue Code, responsible as the superior holder of the two lands which he said belonged to defendant No. 1. A decree was accordingly passed against both the defendants for the full sum claimed.

In appeal the District Judge held that neither article 110 nor 115, nor again 132 applied, and that the case was governed by article 120, and that both defendants were liable to the whole claim,

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In second appeal the principal point raised by Mr. Khare was that the case was governed by article 110 and not by article 120. The contention about the application of the other articles—62, 115 or 132—need not be considered, as they were not pressed by Mr. Khare.

Article 110 prescribes the period of limitation for suits in respect of arrears of rent. The Courts below have held that the claim of the plaintiff in this case was not of the nature of rent but of land revenue. Rent is defined in section 105 of Act IV of 1882, and, in brief, is money payable by a tenant to a landlord under a contract between them. In section 83 of the Land Revenue Code, 1879, the tenant is described as one who is placed in possession of land by another, or in that capacity holds, takes or retains possession of the land permissively from or by sufferance of another. The payment of money or services made by such a person is called rent, and its amount is determined by contract or custom. In the present case the defendants cannot be regarded as plaintiff's tenants. It is admitted that they were not placed in possession by the plaintiff or his predecessor in title under any agreement. As the village is Inám, they are not registered occupants or *khálediárs* as they would be if the village belonged to Government. They can, therefore, only be inferior holders under the plaintiff, who is the superior holder. In section 3, clauses 13 and 14, the words "superior" and "inferior" holders are defined, and these definitions include those inferior holders who have either to pay rent or land revenue to their superior holders.

The question therefore is, whether the defendants are inferior holders who have to pay rent to the plaintiff, or only land revenue. Mr. Khare contended that the Inámdár has succeeded to all the rights of the Government, and defendants must therefore be regarded as placed in possession by those under whom plaintiff claims. The defendants must therefore be held to be inferior holders kept in possession by the plaintiff, and the money payable by them is rent.

A perusal of several sections—from 83 to 86 and 58—of the Code satisfies me that whenever the Code refers to alienated villages it always describes the payment made by inferior holders as being either rent or land revenue, while in the case of

Government villages it always speaks of the payment as land revenue only. This alternative form of expression is obviously used, because the superior holder in an alienated village may have both tenants and inferior holders under him. In the present case the defendants are not tenants, and therefore the District Judge was right in holding that the payment made was land revenue and not rent. The article applicable is, therefore, article 120, as there is no other special provision which can apply to claim for land revenue. As regards defendant's other objection, section 217 provides that when a survey settlement has been introduced into an alienated village, the holders of all lands shall have the same rights and be affected by the same responsibilities in respect of the land in their occupation as occupants in unalienated villages have or are affected by under the provisions of the Code. The village of Kothure has been surveyed and settled. This is an additional reason why the claim must be regarded as one not of rent but of land revenue, and article 110 therefore cannot apply. The Courts below were right in holding that defendant No. 2, who is khátedár of all the lands, is responsible for the arrears claimed. Though section 136 does not apply to the defendant No. 2, section 217 clothes him with all the responsibilities of an occupant.

I would therefore reject the appeal and confirm the decree.

CROWE, J. :—In this suit plaintiff, who is one of the sharers of the Inám village of Kothure, sued to recover from the defendants the assessment of certain lands for five years from 1891-92 to 1895-96. The first defendant did not appear, and the principal contention of defendant 2 was that the claim for arrears beyond the last three years was time-barred, and that he was not liable for the assessment of survey Nos. 195 and 196, which were in the possession of defendant No. 1. The Court of first instance held that as all the lands in suit stood in the kháta of defendant 2 in the village records, he, as superior holder, was primarily responsible to plaintiff as owner for the assessment. On the question of limitation it held that article 132 applied to the case, and, if not, then it was governed by article 120, and awarded the claim with costs. The lower Appellate Court confirmed the decree, and held that article 120 applied, as there was no other

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article which could apply, the claim being for land revenue, which was something quite different from rent. It has been strenuously contended by Mr. Khare for the appellant that neither article 132 nor 120 is applicable, and that the case must be governed by article 110, which applies to arrears of rent only.

The learned District Judge held that rent and land revenue were clearly distinguished in the Land Revenue Code, and he cited section 83, which he observed deals with and impliedly defines rent. It is sufficient to remark that section 83 does not profess to define rent, and no definition of the term is found in the Land Revenue Code.

Rent is defined in section 105 of the Transfer of Property Act (IV of 1882), which runs as follows:—"A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The transferor is called the 'lessor,' the transferee is called the 'lessee,' the price is called the 'premium,' and the money, share, service or other thing to be rendered is called the 'rent.'" Though the expression "rent" occurs in section 83 of the Land Revenue Code, the object of that section is clearly to define a tenant's rights. By section 45 of the Act, all land is declared liable to the payment of land revenue to Government. A tenant signifies a person who holds by a right derived from a superior holder called his landlord, or from his landlord's predecessor in title. In the present case the superior holder is the Inámdár, the land having been alienated, by which is meant, according to section 3, clause (19), "transferred in so far as the rights of Government to payment of the rent or land revenue are concerned, wholly or partially to the ownership of any person." In this definition the expressions "rent" and "land revenue" are used indiscriminately to denote the amount payable by the occupant to Government, and it seems impossible to hold that the law contemplated anything different in the connotation of the two expressions. It is true that the tenant in the present case does not hold direct from the superior holder, permissively or on

sufferance, but he holds from the superior holder's predecessor in title, namely, from the Government. It is true that the amount of the rent which the Inámdár is authorized to levy is limited in some cases to the amount of land revenue or assessment actually settled by Government with the particular tenant, but it none the less falls, as far as the superior holder is concerned, under the denomination of rent or money to be rendered in consideration for the transfer of the right to enjoy certain immoveable property for a certain time or in perpetuity. I am of opinion that this case is governed by article 110, and that the plaintiff's claim is limited to arrears for three years preceding the date of the suit. It is admitted that the survey settlement has been introduced in the village of Kothure, and therefore defendant 2 being the registered occupants of the lands, survey Nos. 195 and 196, is, under the provisions of section 237, affected by the same responsibilities as a registered occupant in an unalienated village, and all the provisions of the Land Revenue Code relating to registered occupants are applicable to him. He is therefore primarily responsible for the land revenue of the lands standing in his name. I would amend the decree of the lower Court to the extent indicated above and confirm the rest of the decree.

Owing to the above difference of opinion this case was laid before Mr. Justice Whitworth, who delivered the following judgment on 21st January 1901:

WHITWORTH, J.:—The point of difference in the judgments above is whether article 110 or article 120 of the Limitation Act applies to the claim in question, or, in other words, whether the dues claimed are 'rent' so as to come under article 110, or are 'land revenue' other than rent, so as not to come under that article, which is concerned with rent alone.

The question whether the dues claimed are rent is, I think, identical with the question whether the relation of landlord and tenant existed between the parties. The "rent" is not defined in the Land Revenue Code, but the relation of landlord and tenant is. And rent is defined in the Transfer of Property Act. But under both enactments an agreement between the parties is the basis of the relation, whether it be called a relation of landlord nd tenant, or a relation entitling to the receipt of rent. 'A

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right derived from a superior holder' is the expression used in the one law; and a 'transfer of a right to enjoy' is the expression used in the other: and they equally imply a contract between the parties.

Now in the present case there is no such agreement between the parties. The defendant has not been placed in possession by the plaintiff, and what the plaintiff seeks to recover is not a payment agreed upon between him and the defendant, but is assessment, which has been fixed by the Survey Department of Government.

It has been argued by Mr. Khare (who has argued the case before me *ex parte*) that the plaintiff has the right of enhancing the rate of payment, and that therefore it is rent and not assessment. The record does not show that he has such a right, but even if he has, it must be a limited and conditional right, for it cannot be contended that his rights as Inámdár are wider than those of the Government which granted the inám, and the latter are limited now by section 107 of the Land Revenue Code and formerly by section 30 of Bombay Act I of 1865, while it is matter of history that no unlimited right of assessment has ever been put forward. Indeed the definition of the term "alienated" itself implies the recognition of other rights than those of Government and of the alienee. "Alienated" means transferred in so far as the rights of Government to payment of the rent or land revenue are concerned, wholly or partially, to the ownership of any person. This at once places the relationship on a different footing to that of a landlord and tenant, who, independently of any authority, come to terms as to what the one is to receive from the other. Only to that ordinary relationship, I think, is article 110 of the Limitation Act intended to apply.

But Mr. Justice Crowe has expressed the opinion that the terms "rent" and "land revenue" are used indiscriminately in defining the term "alienated" in section 3, clause (19), of the Land Revenue Code, and that it is impossible to hold that the law contemplated anything different in the connotation of the two expressions. But to make such a use of the terms a basis for applying article 110 to the present case, it would be necessary to show that the terms are used as equivalents, not in one place only,

but throughout the Code, or indeed throughout Indian legislation generally. That is obviously impossible. The term "rent" is used, as for instance in section 87 of the Code, where the term "land revenue" would be inapplicable. In fact it seems to me perfectly correct to say that the term "rent" is used in the Code only with reference to those superior and inferior holders between whom the relationship of landlord and tenant subsists, and not with reference to those superior and inferior holders between whom the relationship does not exist.

Further, I do not think that the term "rent" and "land revenue" are used indiscriminately even in the one instance cited. No doubt a vast majority of alienations are alienations of land revenue, but there is nothing to prevent Government from being a landlord, or from alienating land of which it is the landlord. That appears to be sufficient reason for inserting the term "rent" as well as the term "land revenue" in the definition of "alienated."

I concur in the judgment of the late Mr. Justice Ranade.*

*Decree confirmed.*

* *Note.*—Ranade, J., died on the 16th January, 1901, five days before this judgment was delivered.

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## PRIVY COUNCIL.

KARIM NENSEY (PLAINTIFF), *v.* G. K. HEINRICHS AND ANOTHER (DEFENDANTS).

P. C. 1901. *April* 30. *June* 13.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

*Contract—Construction of contract—Contract indefinite as regards duration—Agreement to pay a certain sum as maintenance—Effect on agreement of defeasance being rendered impossible.*

Gifts or contracts expressed to be for maintenance, and indefinite as regards duration, may be shown by the acts of the parties or other circumstances to be intended to operate in perpetuity; but, *primâ facie*, they are limited to the life either of the grantor or grantee.

* Present: Lord Hobhouse, Lord Macnaghten, Lord Robertson, Sir Richard Couch, and Sir Ford North.

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The plaintiff, one of a family of Khojas, carried on business with his grandfather Peeroo, his father Nensey, and his two uncles Kassum and Fazul, his share in the business being 2 annas. Amongst their other business the firm was employed as contractors and brokers by the defendants' firm. On 30th July, 1894, a deed of dissolution of partnership was drawn up, the basis of which was that the accounts of all the partners should be considered as settled, and that they should mutually release and be released by each other. The agreement stated the pecuniary relations of each of the partners, whether debtor or creditor to the firm, and also the terms on which each should retire and be released. The plaintiff was indebted to the firm, and by the deed it was provided that he should be released from all claims against him, and should release the other partners from all claims he might have. The deed was signed by the other partners, but the plaintiff objected to sign it, on the ground that its terms were unfavourable to him as it made no provision for him and left him dependent on his father, with whom he was then on bad terms. To induce the plaintiff to consent to the dissolution, in which they were interested, the defendants gave him the following letter, dated 4th August 1894: "In consideration of your having at our request signed the agreement of dissolution of partnership made between Peeroo, Nensey, Kassum, Fazul and yourself, and dated 30th July last, we hereby agree to pay you, on behalf of Nensey, a sum of Rs. 500 per month, payable on the first of each month, until such time as your father Nensey makes provision for your maintenance, so as to give thereby himself the above sum every month for such maintenance." The plaintiff thereupon signed the deed of dissolution. Nensey died in March, 1898, without having made any provision for the plaintiff's maintenance.

*Held* (affirming the decision of the High Court) that the liability of the defendants to pay the Rs. 500 a month to the plaintiff came to an end on the death of Nensey. The language of the contract pointed strongly to the life of the intended or supposed grantor as the limit of the benefit, and there was nothing in the position of the parties or the circumstances of the case to give it any other construction.

APPEAL from a decree of the High Court at Bombay (25th August, 1899) reversing a decree of that Court in its Original Civil Jurisdiction (22nd April, 1899) in favour of the plaintiff.

The appeal arose out of a suit brought by the plaintiff (the present appellant) for money which he alleged to be due on an agreement which was executed by the defendants in his favour on the 4th August, 1894.

The facts of the case were that prior and up to the 30th July, 1894, the plaintiff (whose family were Khojas) carried on business in partnership with his father Nensey Peeroo Mahomed, his grandfather Peeroo Mahomed, and his uncles Fazul Peeroo

Mahomed and Kassum Peeroo Mahomed, under the names and styles of Peeroo Mahomed and Nensey Peeroo. The deed of partnership was dated the 21st December, 1885, and under it Nensey had a 5-anna share, Karim (the plaintiff) a 2-anna share, and the remaining 9 annas was equally divided between Peeroo and his other sons Fazul and Kassum. Part of the business of the firm was acting as mukádams (contractors and brokers) for the defendants Heinrichs and Glade, who also traded under the name of Glade & Co.

In 1894 a dissolution of the partnership was proposed, and was agreed to by all the partners except the plaintiff, and an agreement to dissolve the partnership was drawn up, dated 30th July, 1894. The basis of this agreement was that the accounts should be treated as having been adjusted and settled and that all the partners should mutually release and be released by each other. It stated the pecuniary relations of each partner to the firm (whether a debtor or creditor to it) as shown by the books, and also the terms in which each partner was to retire and be released by the others. The third clause related to Nensey Peeroo, the plaintiff's father. It recited that about Rs. 3,75,000 was due by him, and agreed that in respect of this he should pay Rs. 75,000 to his father Peeroo Mahomed, and further that he and his heirs should pay certain allowances to Peeroo for his life, and after his death to his wife. It also recognized the exclusive right of Nensey Peeroo to certain specified properties. The sixth clause related to Karim Nensey, the plaintiff, and provided that he should be released from all claims against him, and should release all claims he might have. It was in evidence that his indebtedness, as shown by the books of the firm, proved by Fazul Mahomed, was about Rs. 76,000. No provision was made for the plaintiff by the agreement for dissolution. The deed was signed by the other partners, but the plaintiff objected to sign it, on the ground that its terms were unfavourable and disadvantageous to him, as no provision was made by it for him, and he was left dependent on his father, with whom he was at that time on bad terms. In consequence of the continued refusal of the plaintiff to sign, the defendant Heinrichs endeavoured to induce the plaintiff to agree to the dissolution, and ultimately offered

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on behalf of his father Nensey Peeroo to guarantee the plaintiff as maintenance the sum of Rs. 500 a month until he could make arrangements with his father to allow him that sum for his maintenance. The plaintiff declined to agree to this unless it was put into writing, and Heinrichs therefore signed and gave the plaintiff the following letter which constituted the agreement on which the suit was brought :—

MR. KARIM NENSEY, *Bombay, 4th August 1894.*

In consideration of your having at our request signed the agreement of dissolution of partnership made between Mr. Peeroo Mahomed and Messrs. Nensey Peeroo, Kassum Peeroo, Fazul Peeroo and yourself, and dated the 30th July last, we hereby agree to pay you on behalf of Mr. Nensey Peeroo a sum of rupees five hundred per month, payable on the 1st of each month until such time as your father, Mr. Nensey Peeroo, makes provision for your maintenance, so as to give thereby himself the above sum every month for such maintenance.

Yours truly, GLADE & Co.

The plaintiff thereupon executed the deed of dissolution of partnership, and the sum of Rs. 500 a month was paid him by the defendants' firm up to the death of Nensey Peeroo, the plaintiff's father, which took place on 29th March, 1898. On their refusal to continue the payment the suit out of which this appeal arose was instituted on 2nd August, 1898.

The plaintiff had taken out letters of administration of his father's estate, but he alleged that the estate was insolvent, and that he had no provision out of the estate and took nothing by his father's death. He claimed Rs. 2,023-6-0 with further interest on Rs. 2,000, part thereof, at 12 annas per cent. per month from 1st August, 1898, until payment.

The defendants contended that they were under no obligation to pay the plaintiff the Rs. 500 a month after the death of Nensey Peeroo. They stated that the defendant Heinrichs had endeavoured to get the plaintiff's father to provide for the plaintiff's maintenance, but without success. They further alleged that the plaintiff, since the death of his father, was amply provided for out of his father's property, and they claimed that the letter of the 4th August, 1894, should be delivered up to them to be cancelled.

The High Court in its Original Jurisdiction (Tyabji, J.) held that the agreement of 4th August, 1894, meant that the

maintenance of Rs. 500 a month was to be paid to the plaintiff for his life. He therefore gave a decree for the plaintiff.

The defendants appealed, and the Appellate Court on 25th August, 1899 (Jenkins, C.J., and Candy, J.) reversed the decree of the lower Court, and dismissed the suit with costs.

Jenkins, C.J., in coming to that conclusion, observed:—

The question that arises for our determination is whether this document of the 4th August, 1894, secures, as the plaintiff contends, the payment to him of a monthly sum of Rs. 500, if not in perpetuity, at any rate for his life, or whether, as the defendants urge, it was not intended to operate in any event beyond Nensey Peeroo's life. Mr. Justice Tyabji accepted the plaintiff's contention and accordingly passed a decree in his favour; it is from this decree that the present appeal has been preferred. The appellant maintains that in view of the ambiguity of this letter it is necessary for the purpose of determining its true meaning to consider the surrounding facts. Thus it is pointed out that the partnership of which the plaintiff was a member might be expected to secure so long as it lasted a certain income to the plaintiff, and it was this advantage that the plaintiff declined to resign. Further it is said that this income so far as it arose out of the business necessarily ended, or was at any rate determinable, on a dissolution of the partnership, an event which in any case must have occurred on the death of any of the partners despite any opposition on the plaintiff's part. In no case therefore could this income have lasted beyond Nensey Peeroo's lifetime except with the consent of the other partners. These circumstances, it is urged, give some clue as to what the letter was designed to secure.

Turning then to the letter itself we find it does not contain an agreement to pay 500 rupees per month *simpliciter*, but to make this payment on behalf of Mr. Nensey Peeroo as though the plaintiff were an agent for him, a relationship if it in fact existed would manifestly terminate with the principal's death. I do not suggest that such a relationship in fact existed, but the language is to some extent suggestive of a liability coterminous with such a relationship. Further it appears that this payment was to be made until Nensey Peeroo made provision for the plaintiff's maintenance 'so as to give thereby himself the above sum every month for such maintenance.' This again points to a common design that the liability was to take the place of the maintenance, which it was expected Nensey Peeroo would, as a Mahomedan father, allow his son, and also to an intention that the obligation should continue only so long as Nensey Peeroo was alive to provide this maintenance. As against this it is argued that the words of the letter do not expressly limit the liability, which would therefore continue until Nensey Peeroo created a sufficient security in the plaintiff's favour for the payment of 500 rupees, and that by reason of this liability the defendants would have remained liable though Nensey Peeroo had voluntarily allowed the plaintiff 500 rupees during his lifetime, and even though, as may prove

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to be the case, he may have left an estate from which the plaintiff as one of his heirs derived an income vastly in excess of that amount. Such a contention appears to me under the circumstances of the case to be unreasonable, and after giving to this letter the best consideration I can, I come to the conclusion that its phraseology points to an intention to secure a personal maintenance from Nensey Peeroo during his lifetime, and that it was not in the contemplation of the parties, nor is it the legal effect of the document in suit, to impose an obligation on the defendants to continue payment of Rs. 500 a month to the plaintiff after Nensey Peeroo's death. I would therefore allow the appeal, and dismiss the suit with costs.

Candy, J. (after referring to the construction put upon the letter by Tyabji, J.), said:

The sole question for our consideration is whether that is the correct construction of the letter. In my opinion it is not. If the parties had intended that such should be the agreement, nothing would have been easier than to say so. The letter was drafted by an experienced lawyer's clerk, and he could easily have written 'for life or until &c.' It is clear that Mr. Heinrichs bound himself to use his influence with Nensey to induce Nensey to make a settlement and provision for his (Nensey's) son Karim out of his estate, so that the son would get at least a monthly income of Rs. 500. There is no reason to disbelieve Mr. Heinrichs when he deposed that after the letter was written he several times tried to induce Nensey to make the required provision for his son. But he failed. So he had to go on making the monthly payment to Karim; but in March, 1898, Nensey died, and then Mr. Heinrichs considered that his firm's liability ceased. Karim admits that he took out letters of administration to his father's estate after his father's death. What will be the final result of that administration—whether it will be a profit or a loss to Karim—seems to me to be beside the question. Nensey being dead it is impossible for Mr. Heinrichs to use any influence on him to make any provision for Karim. The condition on which Mr. Heinrichs signed the letter was 'until such time as your father makes provision &c.' The father as long as he was alive was in a position to be influenced by Mr. Heinrichs, and so long accordingly the contract held good. When the father died the condition became impossible, and the contract was at an end. It is not contended that while Nensey was alive Mr. Heinrichs did not do all in his power to persuade Nensey to make an allowance to his (Nensey's) son. There is no default alleged on the part of Mr. Heinrichs. He certainly did not in terms bind himself to make the payment to Karim for Karim's life, should Karim survive his father. I feel quite unable to come to the conclusion that such was the intention of the parties and therefore the contract cannot be applied to circumstances which were not in the contemplation of the parties when the contract was made (see remarks of Brett, J., in *Jackson* v. *Union Marine Insurance Co.*(1) As was said in *Baily*

(1) (1873) L. R. 8 C. P. 572 (581).

v. *De Crespigny*,(1) where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. I take it that what Mr. Heinrichs in effect said to Karim was—'I will do my best to persuade your father Nensey to make due provision for you, and until I succeed in persuading him we will pay you the Rs. 500 a month.' Obviously it is impossible now that Nensey is dead for Mr. Heinrichs to persuade Nensey to do anything. The impossibility of the event upon which the promise is contingent has the same effect upon the contract as the impossibility of the act which is the object of the agreement. Supposing Mr. Heinrichs had said : 'We will pay you Rs. 500 monthly until your father attains the age of 60,' and the father died at the age of 50, would Glade have been bound to continue the payment after the father's death ? If not, then why should they be bound to continue it under the circumstances of the present case ?

From the decision of the High Court the plaintiff appealed.

The only question in this appeal was as to the construction of the letter of 4th August, 1894, the appellant contending that the respondents continued liable under it, and the respondents contending that their liability ceased on the death of the appellant's father Nensey Peeroo.

*Lawson Walton*, K.C., and *J. D. Mayne* for the appellant.

*R. B. Haldane*, K.C., *J. Jardine*, K.C., and *Kenyon S. Pasker* for the respondents.

[1901, April 30th]—*Lawson Walton*, K.C.:—Unless there is some express language to terminate the defendants' obligation, it would continue. Their liability continues until the plaintiff has obtained maintenance from his father. The father's death has of course rendered it impossible for him to make provision for his son, but it is submitted that the father's death does not relieve the defendants from the obligation: in fact the event on which the liability was to terminate has not happened. It is submitted the intention was that the son should be supported as long as he required it, and not only until the death of his father, and if it was not intended that the allowance was to continue, it should have been expressly so stated.

(1) (1869) L. R. 4 Q. B. 180 (185).

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*J. D. Mayne* on the same side:—The son had an interest in the partnership independent of his father and one which would not have been terminated on his father's death; this allowance was consideration for his agreeing to the dissolution of the partnership ; it ought therefore to be presumed to continue after the father's death. It must have been contemplated that it would compensate him for what he was giving up by agreeing to the dissolution of the partnership; but if it ceases at his father's death it do es not so compensate him.

Counsel for the resp ondents were not called upon.

[1901, June 13th]—Their Lordships' judgment was delivered by

LORD HOBHOUSE:—The question raised in this appeal is whether the High Court of Bombay has placed a wrong construction on a written agreement made between the appellant who is plaintiff in the suit, and the respondents who are defendants. The agreement is in the form of a letter from the defendants to the plaintiff, dated 4th August 1894, and expressed as follows:—

MR. KARIM NENSEY,

In consideration of your having at our request signed the agreement of dissolution of partnership made between Mr. Peeroo Mahomed and Messrs. Nensey Peeroo, Kassum Peeroo, Fazul Peeroo and yourself, and dated the 30th July last, we hereby agree to pay you on behalf of Mr. Nensey Peeroo a sum of rupees five hundred per month payable on the first of each month until such time as your father, Mr. Nensey Peeroo, makes provision for your maintenance, so as to give thereby himself the above sum every month for such maintenance.

Yours truly, (Signed) GLADE & COMPANY.

The circumstances bearing on the nature of the agreement are as follows:—The plaintiff was a partner in trade with his grandfather Peeroo Mahomed, his father Nensey Peeroo, and his uncles Kassum and Fazul. The profits were shared in various amounts, the plaintiff's share being two annas. It does not appear whether the partnership was for any definite period, or whether any notice was required to dissolve it. In the year 1894 a deed of dissolution was prepared and executed by the plaintiff's four partners on the 30th July. It contains statements of the pecuniary relations of each partner to the firm as shown by the books, whether a debtor or a creditor to it, and of the terms on which each is to retire and

release his partners. The plaintiff's father is stated to be very heavily indebted. The plaintiff is stated to be indebted, and it appears by the books proved by his uncle Fazul that his debts amounted to Rs. 76,000 or more. The deed provides that he shall transfer all his interest to his grandfather; that his debt to the firm shall be written off; and that his grandfather shall free him from responsibility for any debt of the firm.

The plaintiff hesitated to sign this document. When the four others executed it they inserted a statement to the effect that he had not executed it, but it was hoped that he would do so.

The defendants carry on business in partnership under the firm of Glade & Co. They employed the plaintiff's firm, or his father as one of the firm, to transact their mukádam business; and they were consulted about the dissolution. For some reason they were desirous that the dissolution should take place as arranged, and were willing to give the plaintiff some benefit to induce him to agree. Negotiations between them resulted in the letter of 4th August now sued on; and on the same day the plaintiff signed the dissolution deed.

The plaintiff's family are Khojas, who, though Mahomedans, have some peculiar customs. It is not shown what is the custom prevailing in their caste with reference to a son's right to maintenance from his father, nor is it shown what were the legal incidents of the property, of which the father appears to have been in possession, as between him and the family. At any rate no suggestion is made by the plaintiff that the custom of the caste gives him any stronger claim for maintenance than among Hindus a son would have against a father in possession of family property. Nensey Peeroo may have been bound to maintain the plaintiff out of family property; but there is nothing to show that he was bound to maintain an adult son, or to give him any definite sum or proportion, or to settle property on him by way of permanent provision.

As a matter of fact Nensey Peeroo was on bad terms with the plaintiff and did not provide any maintenance at all for him. Consequently the plaintiff had recourse to the defendants who paid him the stipulated sum up to the month of April, 1898. In March of that year Nensey Peeroo died. The defendants then

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declined to pay anything more, conceiving that their liability did not extend beyond Nensey Peeroo's life.

The plaintiff alleges that his father, to whom he took out administration, died not only intestate but insolvent, and that the defendants had agreed unconditionally to secure him an income of Rs. 500 per month. On that view he brought the present action, which was tried in the High Court before Mr. Justice Tyabji. That learned Judge declared that the stipulated amount was to be paid to the plaintiff for his life, and passed a decree on that footing. His reasons are not stated. On appeal by the defendants, the Court, consisting of Chief Justice Jenkins and Mr. Justice Candy, was of a different opinion, and dismissed the suit.

The learned Chief Justice held that the liability of the defendants was intended to take the place of the maintenance which it was expected that Nensey Peeroo as a father would allow to his son without any intimation that there is any joint family property or that the father is subject to legal claims for maintenance of an adult son. The learned Judge speaks of him as a Mahomedan father. Mr. Justice Candy construes the document to mean that the defendants were to do their best to persuade the father to make provision for the son, and were to pay him Rs. 500 a month until they succeeded in that work of persuasion. Then finding it proved that the defendants had done their best to persuade Nensey Peeroo while he was alive, he held that their contract had been fully performed. The grounds taken by the two learned Judges differ in expression, but in substance they amount to the same thing, *viz.*, that the obligation of the defendants to maintain did not extend beyond the life of Nensey Peeroo. If the inheritance then devolving on the plaintiff has turned out to be insufficient, that was a contingency not provided for. The defendants did not undertake that Nensey Peeroo should die rich enough to leave the plaintiff an inheritance worth Rs. 500 per month.

Their Lordships have no hesitation in concurring with the decree appealed from. It is true that the agreement provides for payment by the defendants to the plaintiff without any definite limit of time except the making of a provision by Nensey Peeroo;

and it was argued at the Bar that the provision intended was an actual settlement of property by the father on the son in perpetuity. That puts a strain on the words which they cannot bear. Gifts or contracts expressed to be for maintenance, and indefinite as regards duration, may be shown by the acts of the parties or other circumstances to be intended to operate in perpetuity; but *primâ facie* they are limited to the life either of grantor or grantee. In this case the language of the contract points strongly to the life of the intended or supposed grantor as the limit of the benefit. Whatever may be the relations between a Khoja father and son in this respect, the maintenance spoken of is one to be given by the father himself every month to the son, just as a Hindu father in possession of family property might make a definite allowance to his son. What the defendants guarantee is that the father shall be bound to allow Rs. 500, and that if he does not they will pay on his behalf. There is nothing to show that they intended to incur more liability than Nensey Peeroo would have incurred if he had executed a bond obliging himself to pay his son Rs. 500 for maintenance. Upon his death his paternal obligation to maintain his son would come to an end, and the son's share in the family property would take its place. The defendants have not guaranteed the amount of Nensey Peeroo's estate, nor have they undertaken to pay, on his behalf and by way of maintenance, money which could only be expected to come from him while living.

Such being the reasonable construction of the agreement on its face, it only remains to say that there is nothing in the position of the parties to give it any other construction. A great deal has been said at the Bar of the plaintiff's relinquishment of his interest in the partnership. For all that appears his interest was nothing more than a right to have the accounts taken and the surplus, if any, divided. No attempt is made to show that the terms on which he retired were other than favourable to him, or that by the contract as now construed the defendants did not pay an ample price for avoiding the litigation on which he might have insisted. Allowing that the expressions of the contract are not precise, and that the construction placed on them by the first Court might be shown under supposable circumstances to be the

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true one, their Lordships find nothing in the evidence to suggest that the meaning which most easily fits the words leads to any unreasonable conclusion, or that it was not the real intention of the parties.

They will humbly advise His Majesty to dismiss the appeal. The appellant must pay the costs.

*Appeal dismissed.*

Solicitors for the appellant:—*Messrs. Payne and Latley.*

Solicitors for the respondent:—*Messrs. Cameron, Kemm & Co.*

## APPELLATE CIVIL.

*Before Sir L. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.*

1901.
*February* 5.

SHARIFA (ORIGINAL DEFENDANT), APPELLANT, *v.* MUNEKHAN (ORIGINAL PLAINTIFF), RESPONDENT.*

*Minor—Suit to recover custody of—Suit by a father for the recovery of his children illegally detained—Tort—Death of defendant pending suit—Survival of cause of action against defendant's heirs—Practice—Procedure.*

A Civil Court has jurisdiction to entertain a suit by a father to recover possession of his minor children illegally detained by a stranger. Such a suit is not barred by the provisions of the Guardian and Wards Act (VIII of 1890).

A Mahomedan sought to recover possession of his minor daughters, who were alleged to have been illegally detained by the defendant Mukimbhai. Pending the suit Mukimbhai died, and the suit was continued against his widow Sharifa as his heir and legal representative, on the ground that the minors were in her possession.

*Held*, that the cause of action did not survive as against the widow of the deceased defendant, and that therefore the suit could not proceed. The cause of action which gave rise to the suit was extinguished when the defendant Mukimbhai died.

SECOND appeal from the decision of E. H. Moscardi, District Judge of Surat, reversing the decision of Ráo Bahádur K. B. Marathe, First Class Subordinate Judge at Surat.

The plaintiff, a Mahomedan, sued to recover possession of his two minor daughters, aged 13 and 11 years, respectively, from one Mukimbhai Dhumunbhai, the defendant, alleging that he had left

* Second Appeal No. 473 of 1900.

them with the defendant on his (plaintiff's) way from Bombay to Junagád, and that on his return defendant refused to give them up.

Mukimbhai pleaded *inter alia* that the suit would not lie, and that the plaintiff was not entitled to the custody of the minors as they had been married according to Mahomedan law and custom to defendant's sons with the plaintiff's knowledge and consent.

During the pendency of the suit the defendant Mukimbhai died; and the plaintiff thereupon placed on the record the defendant's widow, Bai Sharifa, as his heir and legal representative, and proceeded with the suit.

Bai Sharifa pleaded *inter alia* that the cause of action did not survive as against her.

The Subordinate Judge held that the suit lay against Mukimbhai, and that the cause of action survived as against Sharifa, his widow, as the minors were in her possession. But he found that they had been married to Sharifa's sons with the plaintiff's knowledge and consent. He therefore held that the plaintiff was not entitled to the custody of the minors, and dismissed the suit.

On appeal the District Judge held that the cause of action survived as against Sharifa, as the minors were in her possession, and that although they had been married to Sharifa's sons, the marriages were not legal for want of plaintiff's consent and authority. He based his finding of this fact upon (*inter alia*) certain entries in the Kazi's books.

He reversed the first Court's decree and awarded the plaintiff's claim.

Against this decision Sharifa preferred a second appeal to the High Court.

*G. S. Rao* and *R. W. Desai* for appellant (defendant):—The lower Court has misconstrued the entries in the Kazi's register. It was also wrong in holding that on the death of the original defendant, Mukimbhai, the cause of action survived as against his widow. The suit is based upon a tortious act committed by the deceased Mukimbhai. On the death of the wrongdoer, his heirs and legal representatives cannot be held responsible for his acts. The suit therefore comes to an end. *Actio personalis moritur*

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*cum persona* — *Phillips* v. *Homfray*.[1] If Mukimbhai's heirs have committed any separate wrong, a fresh action should be brought against them for it, but the present suit cannot be continued against them on the cause of action which existed against Mukimbhai.

*Manubhai Nanabhai* for respondent (plaintiff):—There is no misconstruction of any documents, but assuming that the Kazi's register is misconstrued, the finding of the lower Court does not rest entirely upon the entries in that book. There is other evidence in the case which supports it, and the finding being one of fact is conclusive in second appeal. The suit is one for the recovery of the minors illegally detained by the deceased defendant and after his death by the present defendant. The maxim *Actio personalis* does not apply. It applies in cases where damages are sought to be recovered for the tortious acts of a wrong-doer. *Phillips* v. *Homfray*[2] shows that the cause of action does survive in an action for the recovery of a specific chattel.

[JENKINS, C.J.—Can a minor be treated as a chattel?]

Not now, though it was so under the Roman Law. For damages, the cause of action does survive.

[JENKINS, C.J.—The detention of the minors by the widow is not an act done in her capacity as heir of the deceased defendant.]

No; but she illegally detains them after his death. The objection to the continuance of the suit is purely technical and nothing can be gained by compelling the plaintiff to file a fresh suit. The present defendant has been a party to the suit almost from its beginning and cannot be prejudiced. Section 578 of the Civil Procedure Code (Act XIV of 1882) covers a case like the present.

[JENKINS, C.J.—Can such a suit lie in a Civil Court?

Such a suit will lie in Indian Courts. A writ of *habeas corpus* can only be issued by the High Court, and that too within the local limits of its original jurisdiction. Section 491 of the Criminal Procedure Code (Act V of 1898) prevents the High Court from issuing such a writ to residents in the mofussil.

[JENKINS, C.J.—Are there any English case where an action was brought by a father to recover the custody of his minor children?]

(1) (1883) 24 Ch. D. 439. (2) (1883) 24 Ch. D. 439.

*Dominus Rex* v. *Smith*(1) and *The Queen* v. *Clarke*(2) seem to show that an action would lie at common law. A writ of *habeas corpus* is a summary remedy, but it does not exclude the ordinary remedy by action. There is nothing in the law of India to bar a suit like this. Section 11 of the Civil Procedure Code (Act XIV of 1882) empowers a Civil Court to try all suits of a civil nature except those the cognizance of which is barred by any enactment. There being no enactment debarring such a suit, the Court is competent to try it. Such suits have often been brought in Courts in India. Were it otherwise, the High Court having no power to issue a writ of *habeas corpus* to residents in the mofussil, there would be no remedy to the aggrieved party in a case like the present.

Mayne on Hindu Law (6th Ed.), page 222; *In re W. H. Hutton and his wife*(3); *Muchoo* v. *Arzoon Sahoo*(4); *Raj Begum* v. *Nawab Reza Hossein*(5); *Abasi* v. *Dunne*(6); *Krishna* v. *Reade*(7); *Venkamma* v. *Savitramma*(8); Appeal from Order No. 5 of 1892.

*G. S. Rao* in reply:—We submit that the law in India is substantially the same as in England. In England no action lies at the instance of a father who seeks to recover the custody of his minor children. His remedy is either by a writ of *habeas corpus* or by petition to the Court of Chancery. So too in India a writ of *habeas corpus* may be issued in Presidency towns, whilst in the Mofussil, Act IX of 1861 enabled a father to recover the custody of his minor children by an application to the District Judge and not by a regular suit. Upon such application the District Judge had power to order the production of the children in Court and pass such other order as he deemed proper. This Act (IX of 1861) is now repealed by the Guardian and Wards Act (VIII of 1890), and the provisions of this Act as regards the custody of minors are reproduced in Act VIII of 1890. The Legislature has thus provided a special remedy in such cases, and that remedy alone should be resorted to. In most of the cases cited no objection was raised to the jurisdiction of the Court.

(1) (1733-34) Strange's Rep. 982.
(2) (1857) 7 E. & B. 186 at p. 193.
(3) (1865) 3 W. R. Recorder's Ref. p. 5.
(4) (1866) 5 W. R. 235.
(5) (1865) 2 W. R. 76.
(6) (1878) 1 All. 598.
(7) (1885) 9 Mad. 31.
(8) (1888) 12 Mad. 67.

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JENKINS, C.J. :—This is a suit by a Mahomedan father to recover possession of his two daughters, his case being that he left them with Mukimbhai Dhumunbhai, who afterwards declined to restore them. The defence on the merits was that the plaintiff had willingly given the two girls in marriage according to Mahomedan law and custom.

The first Court on the evidence held this plea established, but the District Judge on appeal came to the opposite conclusion. The appellate Court's decision, however, proceeded on a misapprehension as to the effect of Exhibits 54 and 55, so that in no case could it be allowed to stand. The only question is whether we ought to send the case back or dispose of it here on the other grounds urged before us.

The first point for consideration is whether such a suit will lie, for it is argued that the analogy of English procedure and the provisions of Act VIII of 1890 are opposed to its maintenance. We are, however, concluded by authority ; for it has been held by Mr. Justice Bayley and Mr. Justice Candy, in appeal from Order No. 5 of 1892, that such a suit will lie. It appears to me under the circumstances profitless to enter on any discussion of the question ; for even if we disagreed with that decision we could only refer the matter to a Full Bench. When, however, the Legislature comes to amend Act VIII of 1890 (which I trust may be at no distant date), it will, I think, be worthy of consideration whether the procedure under the Act should not be explicitly substituted for an ordinary suit and the position of a father at the same time made clear.

Another objection urged—not now for the first time, but from the very first—is that the cause of action came to an end on Mukimbhai's death. The lower appellate Court has held that the cause of action survived. Now this means that it could be continued against his successors, but while the District Judge so held, he failed to give effect to his opinion, for he allowed the suit to proceed against one only of these heirs on the ground that the suit was not "against the estate of the deceased but against him personally, and after his death against the person who in succession to himself unlawfully detains the minors." In other words it is the present defendant's wrong that justifies the continuance of the suit against her.

But clearly her own wrong can only be matter of adjudication in a suit commenced against her, therefore there was in strictness no jurisdiction to pronounce on it in a suit commenced against another. It is said, however, that section 578 of the Civil Procedure Code cures the defect; but if in this suit there was no jurisdiction to try the defendant's individual wrong, this is not so. Besides this, as I have already indicated, the District Judge's misapprehension of Exhibits 54 and 55 would in any case have necessitated a reversal, so that we do not reverse or remand the decree on the ground that the suit was wrongly continued against Sharifa, but being compelled to reverse it on another ground I find in this objection a reason for not remanding it. I am glad to be able to arrive at this decision in view of the age the girls have reached and the time they have been in their present custody.

The decree therefore must be reversed. Each party to bear his or her own costs throughout.

CHANDAVARKAR, J.:—This was a suit instituted by the plaintiff Munekhan Shavlikhan in the Court of the First Class Subordinate Judge at Surat to recover possession of his two minor daughters from the defendant Mukimbhai Dhumunbhai. That defendant pleaded, *inter alia*, that the plaintiff was not entitled to the custody of the girls, as he had given them away in marriage, according to Mahomedan law and custom, to the defendant's sons, and that the claim was barred by Act VIII of 1890. The defendant Mukimbhai, however, having died while the suit was pending, his widow, Bai Sharifa, was brought on the record as his heir. In her written statement she adopted her husband's plea, but contended that the suit after his death did not lie, as the cause of action mentioned in it could not survive as against her. The Subordinate Judge overruled all the legal pleas raised by the deceased defendant and his widow, but rejected the plaintiff's claim on the ground that the girls had been married with the free will and consent of the plaintiff.

The plaintiff appealed, and the District Judge of Surat has found that "a form of marriage was gone through between the defendant's deceased husband Mukim, as representative of his two sons on the one part, and as between some other persons on behalf of the plaintiff's minor daughters on the other part, but

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that it is not proved that this person, who represented himself as the father of the minors, was the plaintiff." He therefore reversed the Subordinate Judge's decree and awarded the claim.

Three points have been raised before us in this second appeal against the District Judge's decree, *viz.* (1) that the plaintiff's remedy is not by a regular suit in the Subordinate Judge's Court but by an application under the Guardians' and Wards' Act (Act VIII of 1890) to the District Judge; (2) that as the suit was originally instituted against the defendant Mukimbhai Dhumunbhai for his tortious conduct in illegally depriving the plaintiff of his children and detaining them in his custody against the will of the plaintiff, the cause of action abated on the defendant's death and did not survive against his widow or any other heir; and (3) that the District Judge has misconceived the evidence in the case in finding that the plaintiff did not give away his daughters in marriage to the defendant's sons.

As to the first point, there are some rulings of the Calcutta High Court, reported in Sutherland's Weekly Reporter, that under Act IX of 1861 a father who seeks the custody of his children should proceed by an application to a District Court and not by a regular suit in the Court of a Subordinate Judge. On the other hand, in the matter of the petition of *Kashi Chunder Sen*,[1] Broughton, J., held that the Act did "not create any new right or liability, but it simply provides a special remedy for a right or liability already existing. That being the case, parties might resort either to the ordinary form of a suit or resort to the special form given by the Act," and he relied in support of that view on the cases referred to by Sir Barnes Peacock in the case of *The Collector of Pubna* v. *Romanath*.[2] The High Court of Madras adopted the same view in *Krishna* v. *Reade*.[3] They were all rulings under Act IX of 1861. That Act has been repealed by the Guardians' and Wards' Act (VIII of 1890), and though its provisions have been more or less reproduced in the latter, the language of the Guardians' and Wards' Act is not altogether free from difficulty. The Punjab Chief Court has indeed held in ruling No. 10 of the Punjab Records for 1897 that

(1) (1881) 8 Cal. 266. (2) (1867) Ben. L. Rep. Sup. Vol. p. 630.
(3) (1885) 9 Mad. 31.

a father claiming the custody of his children is, since the passing of the Guardians' and Wards' Act, debarred from proceeding by a regular suit, but must proceed by an application under that Act to a District Court.

There is, however, a decision of this Court in appeal from Order No. 5 of 1892, where the point which we are now considering was gone into by Bayley and Candy, JJ., and it was held that the Guardians' and Wards' Act did not debar a Subordinate Judge from entertaining a suit of this nature. In the absence of any express enactment to the effect that the special remedy provided by the Guardians' and Wards' Act was intended by the Legislature to supplant the ordinary remedy, we think we ought to follow the decision of this Court in the case above cited. We therefore hold that the suit was rightly brought in the Subordinate Judge's Court.

Passing, then, to the merits of the case, we think that the District Judge's finding, that though the marriages are proved, the plaintiff was not present and somebody else represented himself at them as the father of the minors, is based on a misconception of the evidence in the case. He declines to accept the testimony of the witnesses examined for the defendant, because, as he puts it, "these people belong to the lowest dregs of the populace." We cannot, it is true, interfere with the Judge's appreciation of the evidence; but the reason he has given for discarding their sworn testimony appears to be not a legally sound reason, because it is tantamount to saying that the evidence of people who "belong to the lowest dregs of the populace" is *for that reason* absolutely inadmissible. The District Judge, in fact, omits to consider the evidence of these witnesses on its merits because their *status* in society is low. This Court cannot accept a finding of fact arrived at without an application of sound principles to the consideration of evidence as binding upon it.

Apart from that, however, the finding of the District Judge is also based upon a misreading of the two entries in the Kazi's books (Exhibits Nos. 54 and 55). These are in Persian, and have been officially translated for us; and we do not think that they are open to the criticism of the District Judge that they contradict the deposition (Exhibit 84) of the Naib Kazi. It is

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not necessary, however, to reverse the decree and remand the case for a fresh finding on this ground, because we think the appellant is entitled to succeed on the other ground which has been argued before us.

The suit was originally brought against the defendant Mukhimbhai for his tortious conduct in illegally depriving the plaintiff of the custody of his children. It was of the nature of an *actio personalis*, and it is clear law that the cause of action in such a suit does not survive when the defendant dies. As held in *Phillips* v. *Homfray*,(1) penal actions arising from wrong are not generally available against the heir. The mere fact that the present appellant is Mukhimbhai's widow and heir cannot therefore make her responsible for his wrong. If she had, after his death, detained the minors in her custody, it is a fresh tort, giving rise to a new cause of action, for which a fresh suit would have to be brought. It is contended before us that in allowing the suit to be continued against the appellant as the widow and heir of the deceased defendant, the lower Court has committed a mere irregularity, and that we should not reverse the decree under section 578 of the Code of Civil Procedure. But it is not a mere irregularity. The objection which was taken in the Subordinate Judge's Court at the outset goes to the very root of the case, as the cause of action which gave rise to the plaint and on which the merits turned was extinguished, according to law, the moment the defendant died—see per Melvill, J., in *Fakira* v. *Konherrav* (2) in special appeal No. 342 of 1873 and in *Sakharam* v. *Dholapa*(3) in special appeal No. 244 of 1876. If we yield to the argument we should be practically allowing a suit brought against A for his tort to be continued on his death against B for the same, merely because B happened to be one of A's heirs. The minors have now arrived at the age of discretion, and there can be no hardship in leaving the plaintiff to such remedy for the recovery of his children as he may have by law.

I therefore concur in reversing the decree of the Court below and rejecting the plaintiff's claim, leaving each party to bear his or her own costs in all the Courts.

*Decree reversed.*

(1) (1883) 24 Ch. D. at p. 456. (2) 1877 P. J. p. 77. (3) (1876) P. J. p. 248.

# APPELLATE CIVIL.

*Before Mr. Justice Candy and Mr. Justice Crowe.*

JANARDAN (ORIGINAL DEFENDANT), APPELLANT AND APPLICANTS, *v.* NILKANTH AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS AND OPPONENT.* 1901. *February 7.*

*Practice—Decree—Execution—Stay of execution—Civil Procedure Code (Act XIV of 1882), sections 545 and 546.*

An appellate Court cannot pass an order under section 546 of the Civil Procedure Code (Act XIV of 1882) for a stay of execution of a decree under appeal until an order has been made for the execution of the decree.

THE defendant Janardan Govind presented an appeal against the decree of the First Class Subordinate Judge of Belgaum to the High Court. After the admission of the appeal he applied to the High Court, under section 545 of the Civil Procedure Code (Act XIV of 1882), for a stay of the execution of the lower Court's decree pending the disposal of the appeal, on the grounds (1) that three of the respondents were residents of the Native State of Sángli and had very little property in British India, and (2) that all the respondents were so involved in debt that it would be difficult to recover the decretal amount from them in case the decree of the lower Court were reversed.

A *rule nisi* having been issued,

*B. A. Bhagvat* showed cause.

*M. V. Bhat* contra.

CANDY, J.:—This application was made under section 545 of the Civil Procedure Code. It is not alleged that any order has been made for the execution of the decree; therefore no order can be passed under section 546 of the Civil Procedure Code. We discharge the rule with costs.

*Rule discharged.*

* Civil Application No. 421 of 1900.

# APPELLATE CIVIL.

*Before Sir L. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.*

1901. *February* 11.

TUKARAM GOPAL AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* PANDURANG SADARAM (ORIGINAL PLAINTIFF), RESPONDENT.*

*Limitation Act (XV of 1877), sections 5 and 12—Appeal—Subsisting right of appeal—Application for copies—Exclusion of time in computing the period of limitation.*

So long as the right of appeal is subsisting, an appellant is entitled under section 12 of the Limitation Act (XV of 1877) to apply for a copy of the lower Court's decree. The time requisite for obtaining such copy should be excluded in computing the period of limitation prescribed for the appeal.

*Siyadat-un-nissa* v. *Muhammad*(1) and *Sitaram* v. *Ramji*(2) followed.

SECOND appeal from the decision of J. J. Heaton, District Judge of Násik, rejecting an appeal against the decision of Ráo Sáheb R. T. Kirtane, Subordinate Judge of Malegaon.

The plaintiff sued to recover Rs. 400 from the defendants due under a mortgage bond. A decree having been passed in plaintiff's favour, one of the defendants appealed to the District Court, which rejected the appeal as time-barred on the following grounds:

The decree was dated April 22nd. On April 23rd the vacation began and on June 5th, the day the Court reopened, the application for copy of decree was made. Before this last vacation it was not the custom to accept applications for copies during the vacation: but recently the High Court has ordered that such applications shall be received during vacation. This rule was in force during the last vacation. Appellant argues that this new rule was a change in a well-known custom and that he could not be expected to be aware of it and that his ignorance of and failure to conform to the new rule are sufficient cause within the meaning of section 5 of the Limitation Act. Had the appellant himself presented the application for a copy of the decree, I would have given consideration to this argument. But it was his pleader who presented it, in whom ignorance of the rule cannot be excused. Appeal rejected as time-barred. Costs on appellant, who must bear respondent's costs.

The defendants preferred a second appeal.

* Second Appeal No. 168 of 1900.

(1) (1897) 19 All. 342.

(2) (1900) P. J. p. 53.

*Sadashiv R. Bakhle* appeared for the appellants (defendants) :— If we had presented the appeal on the day on which the Court reopened after the summer vacation, it would have been in time. The right of appeal was subsisting on that day under section 5 of the Limitation Act, and that being so, we had a right up to that day to obtain copies. Under section 12 of the Limitation Act we are entitled to deduct the time during which we may obtain copies. We are therefore entitled to deduct up to the 5th June, and we are in time—*Sitaram* v. *Ramji* [1] in which *Siyadat-un-nissa* v. *Muhammad* [2] was followed.

*Mahadeo B. Chaubal* appeared for the respondent (plaintiff) :— The closing of the Court need not have prevented the appellants from making application for the copies. During the vacations the Courts are closed for judicial purposes only and not for formal purposes such as applications for copies.

CHANDAVARKAR, J. :—The decree in the suit out of which this second appeal arises was passed by the Second Class Subordinate Judge of Malegaon on the 22nd of April, 1899. His Court was closed from the next day to the 5th of June on account of the summer vacation. On the 5th of June, when the Court reopened, the present appellant applied for a copy of the Subordinate Judge's decree, and presented his appeal against that decree to the District Judge on the 14th of June.

The District Judge has rejected the appeal as time-barred on the ground that the appellant could have, according to a circular of this Court, applied for a copy of the Subordinate Judge's decree during the vacation as the office was open for that purpose.

Section 5 of the Limitation Act says that if the period of limitation prescribed for any appeal expires on a day when the Court is closed, the appeal may be presented on the day that the Court re-opens. In the present case, however, on the 5th June when the Court reopened, the appellant's right of appeal was subsisting, and so long as it was subsisting he was entitled under section 12 to apply for a copy of the decree and ask that the

(1) (1900) P. J. p. 53. (2) (1897) 19 All. 342.

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time requisite for obtaining it should be excluded in computing the period of limitation for the appeal. This was the view taken in *Siyadat-un-nissa* v. *Muhammad*(1) and *Sitaram* v. *Ramji*.(2)

Following those rulings we reverse the decree of the District Judge and remand the case, with a direction that the appeal be admitted and determined in accordance with law. Costs to abide the result.

*Decree reversed and case remanded.*

(1) (1897) 19 All. 342. (2) (1900) P. J. p. 53.

## APPELLATE CIVIL.

*Before Sir L. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.*

1901. *March* 11.

PANDHARINATH SAKHARAM (ORIGINAL PLAINTIFF 1), APPELLANT, *v.* SHANKAR NARAYAN JOSHI (ORIGINAL DEFENDANT), RESPONDENT.*

*Limitation Act (XV of 1877), sections 5 and 12—Appeal—Exclusion of time for obtaining copies of judgment and decree appealed against.*

An application for a copy of the decree may be made by an intending appellant at any time within the prescribed period of limitation, and he is then entitled under section 12 (in computing the period of limitation) to exclude the time requisite for obtaining such copy.

By section 5, in case the period of limitation prescribed for an appeal expires on a day when the Court is closed, the appeal may be presented on the day the Court re-opens. An application for a copy of the decree may be made on that day, and if so made, the time for obtaining such copy is excluded under section 12.

So long as the right to present an appeal subsists, the exclusion sanctioned by section 12 of the Limitation Act (XV of 1877) applies.

*Siyadat-un-Nissa* v. *Muhammad Mahomed* (1) followed.

SECOND appeal against the decision of H. F. Aston, District Judge of Poona, dismissing an appeal against the decree of Ráo Sáheb K. R. Jalihal, Subordinate Judge of Khed.

The plaintiffs brought a suit to redeem and recover possession of certain property. The Subordinate Judge passed an instalment

* Second Appeal No. 605 of 1900.

(1) (1887) 19 All. 342.

decree in plaintiff's favour on the 10th April, 1900. Being dissatisfied with the decree the plaintiff appealed to the District Judge on the 31st May, 1900, that is after the expiration of the period of thirty days prescribed by article 152, schedule II of the Limitation Act, for presenting an appeal to the District Judge. The Judge dismissed the appeal as time-barred. The following is an extract from his judgment:

> The judgment of the lower Court at Khed was given on 10th April and the Court was closed from 12th April to 29th May. Copy was not applied for till the 30th May at Khed. That was the day on which the appeal should have been presented.
>
> It was therefore the appellant's own fault in not applying earlier for a copy of the judgment sought to be appealed against that his appeal was not presented in time.
>
> This appeal is dismissed as barred by the law of limitation, there being no sufficient reason to excuse the delay.

Plaintiff 1 preferred a second appeal.

*Shivram V. Bhandarkar* for the appellant (plaintiff 1).

Ráo Báhádur *Ghanasham N. Nadkarni* for the respondent (defendant).

JENKINS, C.J.:—This is a second appeal from the decision of the District Judge of Poona, who dismissed the appeal to his Court as barred by the law of limitation.

On the 10th April, 1900, judgment in the suit was given by the lower Court at Khed. On the 12th April that Court was closed and so remained until the 29th May. On the 30th May, the day of re-opening, an application was made for a copy of the decree: it was obtained on the 31st and on the same day the appeal was presented.

Under the Indian Limitation Act of 1877 an appeal to the Court of a District Judge must be presented within thirty days from the date of the decree appealed against. By section 12 of the Act, however, it is provided that in computing the period of limitation prescribed for an appeal, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree appealed against shall be excluded: and it is clear that this exclusion can be claimed on

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whatever day the application is made within the prescribed period of limitation, even though it be on the last.

Then again it is provided by section 5, that if the period of limitation prescribed for any appeal expires on a day when the Court is closed, the appeal may be presented on the day the Court re-opens. The only question is whether the right thus reserved to a would-be appellant entitles him to the exclusion of the time requisite for obtaining a copy of the decree when he makes his application for that purpose on the day the Court re-opens. It may be said that section 5 does not extend the period of limitation, but merely permits the appeal to be presented on a particular day outside the period of limitation, and it must be conceded that ground for such an argument is to be found in the phraseology of the Act. On the other hand, it may be said that such an interpretation adheres too much to the letter of the Act, and that if the application for copies is made at any time when the right to present an appeal subsists the exclusion sanctioned by section 12 applies.

It is a matter of no great importance which view be taken of the Act, so that the point be settled one way or the other. Now as far back as the 17th of March, 1897, a Division Bench of the Allahabad High Court after a full and careful consideration of the matter decided in favour of the second view (*Siyadat-un-Nissa* v. *Muhammad Mahomed* (1)), and, as far as we are aware, in no reported case has dissent from that view been expressed. In fact on more than one occasion that decision has been accepted as an authority in this Court.

Under these circumstances we think we should, notwithstanding all that may be urged on the other side, refrain from disturbing this rule of practice and should adhere to the decision of the Allahabad High Court.

Therefore the decree of the District Judge should be set aside and the case remanded to the lower appellate Court for trial according to law. The costs of this appeal will abide the event.

*Decree reversed.*

(1) (1897) 19 All. 342.

# APPELLATE CIVIL.

*Before Mr. Justice Candy and Mr. Justice Crowe.*

RAMDAS AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* VA'ZIRSA'HEB AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.* 1901. *February 14*

*Res judicata—Civil Procedure Code (Act XIV of 1882), section 13, explanation II—Relief not claimed in former suit.*

A sued B as his agent and trustee in possession of certain lands, complaining that B had been dealing with the lands as if he (B) were the owner, and had mortgaged them to C. C was made a defendant in the suit. B pleaded that he was the owner of the land and not merely agent of A. C also pleaded that B was owner, and he produced the mortgage deed and stated that if he were paid his debt he would not dispute A's claim. The term in C's mortgage deed was one year, at the end of which if the debt were not paid C was to be at liberty to enforce his charge. A prayed merely for possession, and no issue was raised or relief asked in respect of C's mortgage. The Court held that B was agent, not owner, and gave A a decree for possession. Subsequently on the expiration of the year allowed in the mortgage deed, C sued A and B to enforce his mortgage, alleging that even though B might not be owner A had allowed B to deal with the land and to hold himself out as owner and that thus the mortgage was valid. Both the lower Courts held that the suit was *res judicata* under explanation II of section 13 of the Civil Procedure Code, on the ground that C's present claim might and ought to have been made a ground of defence in the former suit brought by A.

*Held*, reversing the decisions of the lower Courts, that the suit was not barred, as no relief was asked or granted as against C in the former suit, though he was a party to it.

SECOND appeal from the decision of B. C. Kennedy, Assistant Judge, F.P., of Bijápur, confirming the decision of Ráo Sáheb H. S. Phadnis, Second Class Subordinate Judge at Bijápur.

Suit on a mortgage executed to the plaintiff by defendants 1 to 5.

The case of defendants 6 to 15 was that the mortgaged property belonged to them and that defendants 1 to 5 were merely their agents and trustees in possession and had no right to mortgage it.

It appeared that the mortgage in question was executed on 24th November, 1892. Before the expiration of the mortgage term,

* Second appeal No. 271 of 1900.

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defendants 6 to 15 brought suit No. 204 of 1893 against the plaintiffs and defendants 1 to 5 to recover possession of the property comprised in the mortgage, alleging that defendants 1 to 5 were their agents and trustees in possession and had no right to mortgage their property. They did not, however, pray in that suit to set aside the mortgage or for a declaration that it was invalid.

Defendants 1 to 5 denied in that suit that they were the agents of defendants 6 to 15 and set up their own proprietory title and the present plaintiffs supported their claim. They, however, failed in this contention, and a decree was passed in that suit awarding absolute and unconditional possession to the plaintiffs therein (defendants 6 to 15 in this suit).

Plaintiffs thereupon brought the present suit to recover the debt due to them on the mortgage and to enforce with charge on the mortgaged property. They contended that as valid defendants 6 to 15 were estopped from disputing the validity of the mortgage, having allowed defendants 1 to 5 to deal with the property and to hold themselves out as owners.

The chief defence now raised was that the suit was barred under section 13, explanation II, of the Civil Procedure Code (Act XIV of 1882) as the matter ought to have been decided in the previous suit.

The Subordinate Judge held that the claim was *res judicata* as against the land and against defendants 6 to 15, but he passed a decree for the amount of the mortgage debt against defendants 1 to 5 personally.

This decree was confirmed in appeal by the District Judge.

Plaintiffs thereupon preferred a second appeal to the High Court.

*Setlur* (with *N. V. Gokhale*) for appellants (plaintiffs):—The only point for consideration is whether the present suit is barred against defendants 6 to 15 and against the land under section 13 of the Civil Procedure Code (Act XIV of 1882). We submit it is not. The plaintiffs in the former suit merely claimed possession of the land, but did not seek to free it from the mortgage. They asked no relief in respect of the mortgage which therefore continued in force. This is clear from the pleadings in

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the case. There was no issue on this point. The matter was therefore not heard and decided in the former suit. The question is whether explanation II of section 13 applies. The validity of the mortgage might, no doubt, have been raised in the former suit, but can it be said that it *ought* to have been raised? Looking to the pleadings in the former suit and the real contentions between the parties, we submit that the parties were not bound to go into the question of the present mortgage and that section 13, explanation II, does not apply.

*Branson* (with *B. A. Bhagvat*) for respondents 6 to 12 and 14 (defendants):—Plaintiffs who were defendants in the former suit in which possession was sought ought to have set forth their claim as mortgagees and ought to have raised the question as to the validity of the mortgage. They were made parties to the suit, and the only reason why we made them parties was to obtain complete relief, *i.e.* relief against them (the plaintiffs) who claimed as mortgagees and against the other defendants who had mortgaged the land to them. The plaintiffs therefore were bound to set up their title which was under the mortgage. They were bound therefore to rely upon the validity of the charge in their favour, and not having done so they are estopped by section 13 of the Code of Civil Procedure.

CANDY, J.:—The point for decision in this second appeal may be succinctly shown thus: A sued B as his agent and trustee in possession of certain lands, complaining *inter alia* that B had been dealing with the lands as if he (B) were the owner, and had hypothecated the same to C. Though both B and C were defendants in that suit, A's prayer was confined to recovery of possession of the lands. He did not ask for any declaration that the hypothecation by B in favour of C was invalid.

B's defence was that he was owner of the lands and not merely agent of A. C also pleaded that B was owner of the lands, and he produced the hypothecation-bond, stating that if he was paid his debt he had no objection to the claim. The term in the bond was one year, at the end of which time, if the debt was not paid, C was to be at liberty to enforce his charge. The year had not then expired.

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The Court raised no issue as to the hypothecation-bond, but simply held that B was agent, not owner, and gave A an unfettered decree for possession.

B appealed, urging that he was owner to the lands. C did not join in the appeal; but pending the appeal, the year to the hypothecation-bond having expired, he sued A and B to recover the debt, and enforce his charge, pleading that even though B might not be owner, still A had allowed B to hold himself out to the world as owner, so the hypothecation-bond created a valid charge against the property.

Both the lower Courts have held that this suit is barred under section 13 explanation II of the Civil Procedure Code, on the ground that C's present plea might and ought to have been made a ground of defence in A's suit.

That is the question for our decision. The answer is that C was not a necessary party to A's suit as framed. He could have been dismissed from the suit. He was not a defendant in possession defending his title. He was a third party holding an hypothecation-bond from the person in possession. Though he was made a defendant by A, no relief was sought against him. The initial mistake was made by A, who though he joined C as a defendant, asked for no relief against him, and made it no ground of attack that the hypothecation was invalid, notwithstanding section 41 of the Transfer of Property Act (IV of 1882). If A is harassed by this litigation he was only himself to blame.

Applying the above principles to this suit we see that A represents defendants 6 to 15, B represents defendants 1 to 5, and C the plaintiffs.

In this view the decree of the lower Courts on the preliminary issue must be reversed, and the case remanded for trial on the merits. Costs will abide the result.

*Decree reversed.*

# APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar, on reference from Mr. Justice Candy and Mr. Justice Whitworth.*

ARDESIR (ORIGINAL PLAINTIFF), APPELLANT, *v.* VAJESING (ORIGINAL DEFENDANT No. 1), RESPONDENT.* 1901. *February* 19.

*Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 62 and 97—Contract—Failure of consideration—Vendor and purchaser—No title in vendor to part of land sold—Failure to give possession to vendee—Suit by vendee for refund of purchase-money—Compensation—Damages.*

On the 25th August, 1891, A sold certain property consisting of forty-two separate plots of land to the plaintiff by a sale deed which contained the usual covenant for quiet enjoyment. The plaintiff obtained possession of thirty-six of the plots, but not of the remaining six. The occupants of the latter had been in possession for many years and claimed to be owners of them. On 6th September, 1897, the plaintiff brought this suit for possession against A (his vendor) and the occupant of one of the six plots, and in the alternative he claimed compensation from A. Both the lower Courts found that A's title to the plot in question had been extinguished at the date of the conveyance to the plaintiff in 1891, and they held that the plaintiff's claim for compensation was barred by limitation under Article 62 of Schedule II of the Limitation Act (XV of 1877). On second appeal it was contended that the plaintiff's right to compensation arose only when the lower Court decided that he could not obtain possession of the land and that consequently his claim fell within Article 97 of the Limitation Act, and was not barred.

*Held*, (Whitworth, J., dissenting) that Article 62 applied and that the plaintiff's claim for compensation was therefore barred. As A (the plaintiff's vendor) had no title to the land at the date of conveyance, the contract of sale was void *ab initio*: there was then a failure of consideration and the plaintiff's cause of action for compensation arose on that date.

SECOND appeal from the decision of Ráo Bahádur Lalshankar Umiashankar, Additional First Class Subordinate Judge, A. P., of Ahmedabad, confirming the decision of Ráo Sáheb C. H. Vakil, Second Class Subordinate Judge at Dholka.

In 1861, one Vajesing Prathiraj (defendant No. 1) purchased a share (*wanta*) in a tálukdári village consisting of forty-two plots of land.

On the 25th of August, 1891, he sold the whole of his share lands to the plaintiff, Ardesir Kavasji, for Rs. 5,000, by a sale-

* Second Appeal No. 312 of 1900.

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deed which contained a covenant for quiet enjoyment in the following terms:

> Should any one put forward a right or claim or cause obstruction or hindrance or make quarrel or disturbance in connection with this "wanta" land, I and my heirs and representatives are to answer for the same.

Plaintiff got possession of thirty-six out of the forty-two plots sold to him, but he was unable to get possession of the remaining six, the occupants of these plots claiming them as their own property.

On the 6th September, 1897, the plaintiff filed this suit to recover possession of one of the six plots of land. The first defendant was the plaintiff's vendor, Vajesing Prathiraj, and the second defendant was the occupant of the land. The plaintiff alleged that his vendor (Vajesing) ought to have put him into possession, but had not done so; that in January, 1896, possession was demanded from both the defendants but without effect. He dated his cause of action in respect of his claim for possession on 25th August, 1891, the date of the conveyance to him, and he claimed possession and the rent for the three years 1894, 1895, 1896. He further prayed that if the Court should not award him possession, it should award him as damages against the first defendant, his vendor, the sum of Rs. 200, being the market value of the land together with the three years' rent.

The Court of first instance found that the first defendant Vajesing had never obtained possession of the land; that the second defendant had been in adverse possession of it from the date of the first defendant's purchase in 1881 and even prior to that date, and had remained so up to the date of this suit, and that the plaintiff's claim to possession was therefore now barred by limitation. It further held that the plaintiff's claim against the first defendant for compensation was also barred under article 62 of the Limitation Act (XV of 1877).

The decision was upheld in appeal by the Additional First Class Subordinate Judge, A. P.

The plaintiff filed a second appeal in the High Court. The only point argued in appeal was as to whether his claim for compensation against the first defendant was barred. The second defendant was not made a party to the appeal.

The case was heard by a Division Bench (Candy and Whitworth, JJ.).

*Ganpat Sadashiv Rao* for appellant (plaintiff) :—The plaintiff's claim to compensation against his vendor (defendant 1) is not barred. Time did not begin to run against him in respect of this claim against his vendor until the date of the lower Court's decision that he could not recover the land itself by reason of the adverse possession of the second defendant. He is entitled to recover the money which he paid to his vendor, the consideration for such payment having failed. But it did not fail until the lower Courts held that his vendor (defendant 1) had lost his title, and could not give possession of the land. The plaintiff's right of action accrued then—Article 97 of the Limitation Act. It did not accrue at the date of the plaintiff's purchase in 1891, for at that time his vendor had still a title. It had not then become extinguished by the adverse possession of the second defendant or twelve years. The case is governed by *Hanuman Kamat* v. *Hanuman Mandur*[1] and *Venkatanarasimhulu* v. *Peramma*.[2] Further, the indemnity clause in the sale-deed distinctly provides that the vendor will be responsible personally if any obstruction to possession be offered by a third person. The plaintiff is entitled under this clause to claim compensation when he is obstructed in taking possession. This indemnity clause is in the nature of a covenant for quiet enjoyment, and the cause of action accrues when the covenant is broken—Dart's Vendors and Purchasers (6th Ed.), page 880; Sugden on Vendors and Purchasers (14th Ed.), page 610; *Raju Balu* v. *Krishnarao*.[3]

*M. N. Mehta* for respondent (defendant 1) :—The plaintiff's claim for compensation is barred. Article 62 of the Limitation Act applies and not article 97. The Courts have found that at the date of the plaintiff's purchase in 1891 from the first defendant, the title of the latter had already been lost by the adverse possession of defendant 2. There was therefore a failure of consideration at the date of the conveyance to the plaintiff and he should have sued the first defendant within three years from that date—*Hanuman Kamut* v. *Hanuman Mandur*.[4] The case of *Venkatanarasimhulu* v. *Peramma*[5] is distinguishable. In that

(1) (1891) 19 Cal. 123.
(2) (1894) 18 Mad. 173.
(3) (1877) 2 Bom. 273.
(4) (1887) 15 Cal. 51.
(5) (1894) 18 Mad. 173.

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case the purchaser had got possession under his conveyance and afterwards lost it, and it was held that the cause of action arose when the possession was lost. Here neither the plaintiff nor his vendor, however, had possession.

The indemnity clause relied upon by plaintiff refers to disturbance of possession after it had been obtained and not to resistance offered at the very outset to the taking of possession. That clause therefore does not help the plaintiff in the present case. The English cases draw a distinction between a covenant for title and a covenant for quiet enjoyment. In the one case limitation runs from the date of conveyance. In the other from the date of the breach thereof. The present case falls within the former category, and therefore plaintiff is not entitled to claim any relief—Dart on Vendors and Purchasers (6th Ed.), page 881.

CANDY, J. :—In my opinion the claim to compensation, which is the only claim before us, is clearly barred, so it is unnecessary to consider such questions as misjoinder &c. The first defendant in 1881 purchased a "wanta" consisting of numerous fields. Of these it is found as a fact by the lower appellate Court that the first defendant never obtained possession of the field now in dispute in the present suit. It was held adversely by the second defendant. Nevertheless, ten years afterwards in (1891) defendant sold this same "wanta" to the plaintiff, and by the conveyance he purported to convey and give possession of the whole "wanta," including the field now in dispute, which it is found as a fact he never had in his own possession.

There is in the conveyance the usual covenant for quiet enjoyment (should any one put forward a claim, or cause obstruction &c. I am to answer for the same), but this from the very nature of the case cannot be regarded as a covenant, that if the vendor fails to put the purchaser in possession of any part of the property, then the vendor will be liable for damages; for by the terms of the conveyance possession had been transferred to the purchaser. As remarked above the clause is the usual covenant for quiet enjoyment, *i.e.* that if any one assails the purchaser's possession (*viz.* the possession which had already been given) the vendor will be answerable.

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On 6th September, 1897, the present suit was filed by the purchaser against the first defendant his vendor, and against the second defendant the person who had been and is still in possession of the field in question, to obtain possession of the said field, asserting that his vendor ought to have put him in possession, but had not done so; that both the defendants were asked in January, 1896, to deliver possession, but they failed to do so, whereby plaintiff loses the rent (*sauth*) of the land. Dating his cause of action in respect of possession as 25th August, 1891 (the date of the conveyance to plaintiff), he claimed possession and three years' rent (1894-95-96); and should the Court be unable to award possession, he asked the Court to decree him from the first defendant the sum of Rs. 200, the market value of the said land, as damages, together with the three years' rent. It is evident that the sum claimed as damages or compensation was a proportionate share of the purchase-money of the whole "wanta". As plaintiff said in his appeal to the District Court, he was entitled to recover from the first defendant the amount of the sale, which must mean the proportionate share of the purchase-money. There is not in the plaint any mention of the clause in the purchase deed covenanting for quiet enjoyment, and there is no reason for supposing that that clause was the foundation of the suit.

The question is, what is the period of limitation for such a suit? The answer is, in my opinion, to be found in the judgment of the Privy Council in *Hanuman Kamat* v. *Hanuman Mandur*.[1] In that case Doalat Mandur, who was joint with his sons, sold to plaintiff an undivided share of the joint property. There is no suggestion in the report of the case (see also 15 Cal. 51) that the conveyance purported to recite that possession was actually given to plaintiff. From the nature of the subject-matter that was impossible. When the plaintiff tried to obtain possession he was resisted by the sons, who under the law as administered in Bengal refused their consent to their father's alienation. In a suit brought by the plaintiff-purchaser to recover back his purchase-money, the question arose as to what was the article of the Limitation Act

(1) (1891) 19 Cal. 123.

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applicable. Their Lordships held that if there never was any consideration, then the price paid by the purchaser was money had and received to his account by the vendor (article 62). But if the sale was only voidable on objection taken to it by the other members of the joint family, then the consideration did not fail at once at the date of the purchase deed, but only from the time when the plaintiff endeavoured to obtain possession of the property, and being opposed found himself unable to obtain possession (article 97).

Applying these principles to the present suit, the case seems clear. *Quoad* the field in question, the failure of consideration was a failure from the beginning. Plaintiff purported to sell and give possession of a field which had never been his property or in his possession. The contract was from the first void. Under this view article 62 of the Limitation Act applies and the suit for the return of the purchase-money was barred. This view is borne out by the decision of the Madras High Court in *Venkatanarasimhulu* v. *Peramma*.[3] In that case the vendor executed a sale-deed of certain land, received the agreed consideration and placed the purchaser in possession. Thus the contract was completed, and it was impossible to say that it was void *ab initio*. Here it never was completed as regards the field now in dispute.

I would confirm the decree of the District Court with costs. As my learned colleague differs, the case must be referred to a third Judge.

WHITWORTH, J.:—Both the lower Courts have held that the plaintiff's claim for compensation against the first defendant is time-barred; and in so holding they have purported to follow the ruling of the Privy Council in *Hanuman* v. *Hanuman*.[2] But that ruling does not seem to me to support the conclusion arrived at in this case. On the contrary, I would take it, as the Madras High Court has taken it in *Venkatanarasimhulu* v. *Peramma*,[1] as leading to the opposite conclusion.

The view taken in this case is that as the first defendant had no title to the land in suit when he purported to sell it to the

(1) (1894) 18 Mad. 173.

plaintiff in 1891, the sale was void *ab initio*, and therefore the plaintiff's suit should have been brought, according to article 62 of the Limitation Act, within three years from the date in 1891. But in *Venkatanarasimhulu* v. *Peramma* also the defendant "had no title to convey" to the plaintiff, and yet, following the same decision of the Privy Council, it was held that the suit brought in 1892 on the purchase deed of 1885 was in time—article 97 and not article 62 of the Limitation Act being held applicable. It is true that in the Madras case possession of the property sold had been given, and in this case it had not; but I do not think that that fact alone, important as it is, is sufficient to determine the question of limitation. The loss of possession once given may carry the starting point of limitation forward to the date of the loss, but a reasonable expectation of obtaining possession may, I think, equally carry it forward to the date when that expectation is defeated.

Now in the present case the property in question is a small part of a *wanta* estate which the first defendant purported to sell to plaintiff in 1891. The value claimed is only Rs. 200 out of a total price of Rs. 5,000. The vendor had himself purchased the estate in 1881. He had himself obtained, and he made over to the plaintiff, possession of the greater number of the fields; but some few fields remained in respect of which this and other suits have been brought. At the time of the plaintiff's purchase a suit by his vendor to recover the remaining fields was still permissible, and it seems to me impossible to conclude that the existence of these fields and of the first defendant's title to them, however weak that title might be, was no part of the consideration of the plaintiff's purchase-money. There is no ground for suspecting fraud in the matter, and I cannot suppose that the deed was made to include the whole *wanta* instead of only the thirty-six fields of which possession could be given merely through idleness or perversity. And if there was a genuine contract extending to all the forty-two fields, then I would hold that the consideration in respect of the six of which possession was not given did not fail until the plaintiff found as a fact that he could not obtain possession of them.

It has been determined in this suit that the particular field in

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question has been long in the adverse possession of the second defendant: and as he has not been made a party to this appeal, that finding is final. But this condition was not known, and the second defendant's title may not even have matured at the time of the contract between the first defendant and the plaintiff. According to the terms of the contract possession of the whole property was actually given to the plaintiff. But such a clause is usual when the intention is to make a complete transfer from vendor to vendee, and has, I think, no more significance than a public officer's receipt, passed every month, for salary which he has *not* received. I should attach more importance to the claus e "Should any one put forward a right or claim or cause obstruction or hindrance or make a quarrel or disturbance in connection with this *wanta* land, I and my heirs and representatives are to answer for the same." For this, though also of a usual character, has a binding force for the future, while the other purports only to recite something that has taken place. But even without relying upon this clause I think the plaintiff acquired a right to sue for compensation when he found it was impossible to obtain possession of a part of the property sold. However small the hope of obtaining possession of this particular field may have been, it must according to its measure have affected the amount of the purchase-money.

There are other points arising in this appeal and I have written a judgment in respect of them: but as they will require determination only if the suit be held to be in time, and as my learned colleague takes a different view on the question of limitation, I withhold that judgment now.

Owing to the above difference of opinion, this case was referred to Mr. Justice Chandavarkar under section 575 of the Civil Procedure Code (XIV of 1882), who delivered the following judgment on 19th February, 1901.

CHANDAVARKAR, J.:—Assuming the finding of the lower Courts to be that the first defendant had no title when he sold the fields in dispute to the plaintiff, I think that the purchase-money paid by the latter became from that date in the hands of the former money had and received for the plaintiff's use. There was never any consideration for it and the sale was void *ab initio*. That

appears to me to be clearly the result of the transaction according to a number of decisions in the English law reports (see *Strickland* v. *Turner*[1]), and also the principle laid down by the Judicial Committee of the Privy Council in the case of *Hanuman Kamat* v. *Hanuman Mandur*.[2]

It is contended, however, for the plaintiff before me that it is not clear that on the date of his conveyance to the plaintiff the first defendant had no title to the fields in dispute. Mr. Justice Whitworth is inclined to think that he had a title on that day, though the title was weak because the second defendant was in possession and had two years from that date to acquire a right by adverse possession for twelve years. Assuming that on the date of his conveyance to the plaintiff the first defendant was owner and passed a good title to the former, it appears to me that no question of failure of consideration can arise to bring this case within article 97 of the Limitation Act, because the purchaser, having become the rightful owner under his executed conveyance, cannot after that hold his vendor liable in damages for the subsequent loss of the title in the absence of proper covenants in the deed itself giving a right to such damages. If a purchaser can sue his vendor for his purchase-money because some time after he has bought the property from the true owner and become himself its owner it is lost by the subsequent adverse possession of a third party, the purchaser would become entitled to a refund of his purchase-money in every case where the property is lost after he has acquired the ownership, as for instance where it is lost by accident or a natural cause. But that is clearly not the law. As observed by Pollock, C.B., in the case of the purchase of an annuity in *Strickland* v. *Turner*,[3] which I have above cited, if the purchase took effect, "though but for an instant, the plaintiff is not entitled to succeed, for he purchased the annuity and cannot complain that in so doing he has made a bad bargain, as the events have turned out." The right to damages can arise only where the subsequent failure of consideration in such a case is due to theact of the vendor himself, or, if it is due to some other cause, the vendor

(1) (1852) 7 Exch. 208. (2) (1891) 19 Cal. 123; L. R. 18 I. A. 158.
(3) (1852) 7 Exch. 208.

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has made himself answerable for it by proper covenants in his deed. Such a covenant, it is argued, there is in the present case.

Reliance is placed on the following clause in the deed of conveyance passed by the first defendants to the plaintiff:—"Should any one put forward a right or claim or cause obstruction or hindrance or make a quarrel or disturbance in connection with this *wanta* land, I and my heirs and representatives are to answer for the same." The contention of the first defendant is that though there was a recital in the deed that possession of the fields in dispute was delivered to the plaintiff on its date, yet as a matter of fact the second defendant was then in occupation as a trespasser, and that by the clause in question the first defendant made himself answerable for the latter's "claim" or "obstruction." I find it difficult to read the clause in that way. Reading the deed as a whole, as I think it should be read, and taking the clause in connection with what has gone before,—particularly the recital that possession had been already delivered—I agree with Mr. Justice Candy that the clause is no more than a covenant for quiet possession of the kind which this Court had to deal with in the case of *Nagardas Saubhaggyadas* v. *Ahmedkhan*.[1] Such a covenant comes into operation only when the purchaser is evicted after he has been put in possession. Were it the intention of the parties to provide that the first defendant should be answerable for failure on the plaintiff's part to recover possession from the trespasser or had the plaintiff bought on the understanding that the plaintiff's right to possession in consideration of his purchase-money was to accrue on, and was subject to, the recovery of the property from the second defendant, and that in case of failure to so recover it the first defendant was to return the money and be liable in damages, they would have and should have said so in the deed itself. And it is the deed that must determine the plaintiff's rights and the first defendant's liabilities. We cannot import terms into it which are not there. Where parties have not chosen to declare their intentions in their instrument, those who have to construe it should be, as observed by Bramwell, B., in *Tarrabochia* v. *Hickie*,[2] "chary in doing for them that which they might, but

(1) (1895) 21 Bom. 175. (2) (1856) 1 H. & N. 183 at p. 183.

have not done for themselves." It is true that the recital as to possession having been already delivered to the plaintiff is not of much significance so far as his right to recover it goes. But it is significant when we have to consider whether there is a covenant for title as distinguished from a covenant for quiet possession. In the case of the former in considering what amounts to a breach, "it may be premised that, as respects the covenants for seisin in fee," the covenants, "if broken at all, are necessarily broken immediately upon the execution of the assurance which contains them, so that the Statute of Limitations immediately begins to run in favour of the covenantor," whereas in the case of the latter the covenants "can only be broken by subsequent events." (See Dart on Vendors and Purchasers, page 881, 6th Edition. See also Mr. Justice Green's ruling in (1877) 2 Bom. 273.) Had the parties here intended that the first defendant was to be answerable for the plaintiff's failure to recover possession from the trespasser, they would not have said in the deed that possession had already been given. On the assumption, therefore, that the first defendant had a good title and conveyed it by his deed to the plaintiff, it must be held that there has been no failure of consideration to bring the case within article 97 of the Limitation Act.

But it is said though the title was good, yet it was defective, because the possession was not with the vendor but was with the second defendant as a trespasser. And that consideration, it is argued, brings the case within the principle of the Privy Council ruling in *Hanuman Kamat* v. *Hanuman Mandur*[1] so as to make article 97 of the Limitation Act applicable to the present case. That was the case of a sale by the father of an undivided Hindu family, consisting of their joint property of himself and his sons, governed by the Mithila law. The father had but limited authority to sell, and the sale was voidable at the option of the sons. In other words, it was a defective sale, which gave only an inchoate right to the purchaser, capable of being perfected or completed by the sons' consent and liable to be defeated by their avoidance. Till either of those events happened, the consideration for the purchaser's purchase-money

(1) (1891) 19 Cal. 123; L. R. 18 I. A. 158.

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was, as it were, in suspense, and directly the sons avoided their father's transaction, the consideration failed. It must be so in the case of transactions entered into by persons with limited authority, as for instance, a manager of a joint Hindu family, an agent, or a minor's guardian, or transactions which require election by some person authorised in law to elect to complete the vendee's title. The principle, then, which I gather from the ruling above referred to is that where a sale is *defective*, because something is wanting to give it full operation, the consideration does not fail till that something fails to happen. That was the principle laid down in the case of *Cowper* v. *Godmond*,[1] and it appears to have been adopted by the Legislature in article 97 of the Limitation Act.

The case, however, before us is not of a defective sale, the completion and validity of which depended upon the consent of anybody. Assuming that the first defendant was owner on the date of his conveyance to the plaintiff, he was the only person entitled to sell, and when he sold the property, the purchaser's title was good and complete. It is true that the second defendant was then actually in possession, but he was in possession as a trespasser. The mere fact that he had two years from that date to acquire a right by adverse possession could give him no right then. There could be therefore no question of his affirmance or avoidance to complete the plaintiff's title. That title was completed when the conveyance was executed by the owner, *i.e.* the first defendant—and the second defendant's wrongful occupation could not make it defective. If, on the other hand, we assume, what Mr. Justice Whitworth has suggested in his judgment, that both the first defendant and the plaintiff were on the date of the conveyance ignorant of the second defendant's possession, I fail to see how that improves the plaintiff's case on this question of limitation. All it shows is that the vendor's and the vendee's knowledge of the circumstances relating to the subject-matter of sale were equal, and that there was no fraud on the part of the vendor. But it also shows that the plaintiff, whose duty it was to make proper and careful inquiries both as to title and possession before buying, was so negligent that he

(1) (1833) 3 Moo. & Sc. 219.

purchased with his eyes shut. Had he inquired he should have known who was in possession. His failure to make careful inquiry is sufficient in law to impute to him the knowledge of what he would have found out had he enquired. We must take it, then, that he purchased the fields knowing that they were in the possession of a trespasser. That, however, cannot make his title incomplete after the conveyance was executed. There is nothing therefore in the facts of the case to bring it within the principle of the Privy Council ruling.

Before I part with the case, I must say a word as to the ruling of the Madras High Court in *Venkatanarasimhulu* v. *Peramma*.[1] I do not think that it is in conflict with the conclusion at which I have arrived on the question of limitation in this case.

There seems to be no warrant in the judgment in that case for saying that the learned Judges who decided it were dealing and meant to deal with the case of a vendor who had "no title to convey." It is true that in a previous suit brought against the purchaser by a third party it had been held that his vendor had "no title"; but with reference to that suit their Lordships say in the judgment that the findings in it are not binding on the purchaser in the suit brought by him against his vendor for failure of consideration. Apart from that, the judgment is clear, and no conflict arises between it and the view I take of the question of limitation under article 97, when we read that judgment with the facts of the case on which it is based. The sale there was by a wife of her husband's property during his absence. It was a defective sale, because the wife could be regarded as her husband's agent when she was in possession during his absence. She could not be regarded as a trespasser. The husband could therefore affirm or avoid her act. That was enough to bring the case within the ruling of the Privy Council, which is there cited and followed. Apart from that, this Madras ruling deals with a case where the purchaser had on the date of his conveyance obtained possession of the property conveyed and continued in possession till at the instance of a judgment-creditor of the vendor's husband it was judicially declared that he had no

(1) (1894) 18 Mad. 173.

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right to retain that possession. In fact the purchaser had got his consideration for his purchase-money and enjoyed the benefit of it till the judicial declaration, when obviously the consideration failed. I think the fact that the purchaser had obtained possession is not only important but is sufficient to determine the question of limitation and distinguish the Madras case from this, because so long as the purchaser is in possession, the consideration exists and no cause of action can arise for damages as for failure of it. For these reasons I agree with Mr. Justice Candy that the decree of the Court below must be confirmed with costs.

*Decree confirmed.*

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## APPELLATE CIVIL.

*Before Sir L. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.*

1901. *March* 6.

RUSTOMJI ASPANDYARJI SETHNA AND ANOTHER (ORIGINAL DEFENDANTS 4 AND 5), APPELLANTS, *v.* SHETH PURSHOTAMDAS CHATURDAS AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 1 TO 3), RESPONDENTS.*

*Partnership—Several firms—Common partner—Money lent by partner to his own firm—Practice—Parties—Same party cannot be plaintiff and defendant in one suit—Debtor and creditor—Death of plaintiff pending appeal—Defendant becoming plaintiff—Power of Court of appeal to vary decree on grounds arising subsequently to decree—Partnership accounts—Contract Act (IX of 1872), section 264—Guarantee—Liability of surety—Right of surety to indemnity.*

Where an individual is a common partner in two houses of trade, no action can be brought by one house against the other house upon any transaction between them while such individual is a common partner. This doctrine is founded on the rule that the same individual, even in two capacities, cannot be both a plaintiff and defendant to one and the same action.

One partner cannot sue for money lent by him to a firm of which he is a member. The advance is but an item in the partnership account.

It is open to the Court of appeal to vary a decree under appeal, not only for error, but also on grounds which have come into existence since it was passed—*Sakharam* v. *Hari*.(1)

* Appeal No. 112 of 1899.

(1) (1881) 6 Bom. 113.

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The plaintiff Purshotamdas Chaturdas and his son Nagindas were members of a joint Hindu family and were the owners of and equally interested in the firm of Gordhandas Bhagwandas. The son Nagindas was also a partner in another firm carrying on business in the name of Pathak Shanghavi and Company. The plaintiff Purshotamdas brought this suit against the latter firm which consisted of four partners, including his son Nagindas (defendant 2), to recover Rs. 61,419-3-1 in respect of advances made by the firm of Gordhandas Bhagwandas to the defendants' firm. The fifth defendant was sued as a surety for one of the partners (defendant 4) in the defendants' firm. The lower Court passed a decree for the amount claimed against all the defendants. One of the partners (defendant 4) and the surety (defendant 5) appealed. Pending the appeal the plaintiff died and his son Nagindas (defendant 2) became sole owner of the family firm and was substituted for his father on the record, thus becoming both plaintiff and defendant in the suit.

*Held*, (1) that although Nagindas (defendant 2) was partly interested both as creditor and debtor and could not have sued for his share, nevertheless all parties interested being before the Court either as plaintiff or defendants, the Court would adjust and determine their rights in accordance with the rule of justice, equity and good conscience.

(2) That Purshotamdas and Nagindas being equally interested in the plaintiffs' firm, the lower Court should have made a declaration that they were entitled to the amount advanced in equal shares, and have passed a decree that one moiety thereof should be paid to Purshotamdas and the other moiety treated as an item to the credit of Nagindas in the partnership accounts.

(3) That although on Purshotamdas' death pending the appeal, Nagindas as his heir had become sole plaintiff, the Court of appeal would not pass a decree in his favour even in respect of Purshotamdas' half-share, but would only declare that for this amount also Nagindas was entitled to credit in the partnership accounts. Under the circumstances Nagindas could only get such relief as would have been permissible had he occupied the position of plaintiff at the institution of the suit.

(4) That Nagindas was entitled to credit in the partnership accounts as against those who actually were his partners from time to time. Section 264 of the Contract Act (IX of 1872) only operates in favour of strangers to the partnership.

As to the liability of defendant 5 as surety, the Court *held* on the evidence that defendant 5 had become a surety for the partnership debt. The partners were the principal debtors. But the liability of the surety is co-extensive with that of the principal debtor; therefore no decree could be now passed against defendant 5. Further, Nagindas, now the beneficial owner of the debt, was one of the principal debtors, and as such was bound to indemnify his surety and to repay any sum paid under the guarantee. He therefore could not be entitled to any relief against his surety.

APPEAL from the decision of Lallubhai P. Parikh, Additional

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RUSTOMJI v. SHETH PURSHOTAMDAS.

First Class Subordinate Judge of Ahmedabad, in suit No. 275 of 1898.

The plaintiff was the owner of the firm of Gordhandas Bhagwandas. The first four defendants were the partners of the firm of Pathak Shanghavi and Company. The fifth defendant was the father of defendant 4, and was sued as his surety.

The plaintiff claimed to recover Rs. 61,419-3-1 from the defendants in respect of advances which, he alleged, his firm of Gordhandas Bhagwandas had made to the defendants' firm of Pathak Shanghavi and Company.

The second defendant Nagindas was the son of the plaintiff. The two lived together as members of a joint Hindu family, and it appeared that the advances made to the defendants' firm were made out of the family funds of the plaintiff and second defendant.

Defendants 1 and 2 admitted the plaintiff's claim.

Defendant 3 alleged that he had retired from the firm in 1895 and was not liable for any advances from that date. Defendant 4 alleged that he had ceased to be a partner on the 13th May, 1896.

Defendant 5 denied that he was surety for his son (defendant 4), alleging that the following letter, which was relied on by the plaintiff, had been fraudulently obtained from him. It was dated 5th May, 1896, and was addressed by him to the plaintiff:

> In Pathak Shanghavi and Company my son Rustomji is a partner. And you have been paying money to the Company from time to time whenever the Company has been in need of it, and I fully hope you will continue to pay the same. You are old like me and so you know me that I am not a beggar and that Rustom is my only son. You should not therefore entertain any anxiety whatever as to the profit or loss in respect of his share. I am careful about it. And we (*i.e.* Rustomji, and I myself for Rustomji,) will be entirely responsible for the whole amount that you might have paid up to this time and will pay hereafter. Therefore you, an old man, will continue to assist with money without entertaining any doubts. This is the only request. Dated 5th May 1896.

The Subordinate Judge passed a decree for the plaintiff for the sum claimed, *viz.* Rs. 61,419-3-1, and ordered that of this sum Rs. 19,908-3-7 should be recovered from defendants 1, 2, 3 and 4; Rs. 13,723-1-8 from defendants 1, 2 and 4, and the

remainder Rs. 27,787-13-10 from defendants 1 and 2 only, and that plaintiff should be at liberty to recover from defendant 5 the amount which he was entitled to recover from defendant 4.

From that decree defendants 4 and 5 appealed. While the appeal was pending the plaintiff died, and his son Nagindas (defendant 2 in the suit and respondent 3 in the appeal) was substituted as his heir.

*Donald* (with *Branson, R. S. Sethna,* and *L. A. Shah*) for appellants (defendants 4 and 5). This suit is not maintainable, for defendant 2 (Nagindas) is a partner in that firm and also a partner with his father the plaintiff. They are members of the same joint family, and the money sued for was money advanced out of the family funds. Nagindas is therefore equally interested with the plaintiff in this suit and is really a co-plaintiff with his father. He is both plaintiff and defendant. The plaintiff ought to have sued for partition and charged defendant 2 with the advances made—*Ramsebuk* v. *Ramlall* [1]; Leake on Contracts (3rd Ed.), page 363; Rules of the Supreme Court, order 48 (*a*) rule 10. Defendant 2 might afterwards claim contribution from the other members of his firm. But as co-plaintiff here he cannot sue, for he is both creditor and debtor, both plaintiff and defendant. His remedy is to sue for dissolution of partnership and for an account—*Chunder Sikhur* v. *Ram Buksh.*[2]

The original plaintiff being now dead, Nagindas (defendant 2), who is his son and heir, is now on the record as plaintiff. He is now in actual fact what he virtually was before, *viz.* creditor and debtor, plaintiff and defendant, in the same suit—Williams on Executors (9th Ed.), page 1175. This appeal Court in dealing with the decree must regard it as if the suit had been originally brought by Nagindas—*Sakharam* v. *Hari.*[3]

Defendant 5 is now sued on his alleged guarantee. We say it was obtained by the fraud and misrepresentation of defendant 2 (Nagindas). On the true construction of the writing it appears that defendant 5 became surety to the plaintiff, not for defendant 4 only, but for the firm. But the plaintiff is now dead and

(1) (1881) 6 Cal. 815. (2) (1878) 1 Cal. L. R. 545.
(3) (1881) 6 Bom. 113.

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Nagindas, who is a member of the firm, is his heir and now stands in his place. He cannot claim payment from the surety of a debt for which he, as a member of the firm, is himself liable equally with the other defendants. The surety is now discharged. Further, if the surety were to pay the debt, Nagindas, as a member of the firm, would immediately become liable to repay him, for the principal debtor is bound to indemnify the surety—Contract Act, section 145.

*Inverarity* (with *Bhaishankar Nanabhai*) for respondents 1 and 3 (original plaintiff, now dead, and Nagindas, original defendant 2).

The Court below found that it was the original plaintiff (Purshotamdas) and not his son Nagindas who advanced to the defendant firm. The suit by the firm is therefore maintainable. The lower Court has found the whole sum due from the firm. The decree being correct, no subsequent event can now be allowed to modify it. The effect of the death of the plaintiff will be considered in the execution proceedings.

*Setalwad* (with *M. N. Mehta*) for respondent 4 (original defendant 3).

JENKINS, C.J. :—The plaintiff, describing himself as the owner of the firm of Gordhandas Bhagwandas, brought this suit to recover Rs. 61,419-3-1. His case against the first four defendants is that they carried on business in partnership under the name of Pathak Shanghvi and Company ; and that the sum he claims is the result of advances made to the partnership. He alleges that the fifth defendant is liable to him by reason of a guarantee of the partnership's indebtedness. The first and second defendants alone admit the claim.

The third, fourth and fifth defendants assert that the advances were made not by the plaintiff, but by his son the second defendant; the third defendant contends that in any case he retired from the partnership in October, 1895, so that he is liable for nothing after that date ; and the fifth defendant maintains that the oral guarantee alleged against him is not proved and that the written guarantee is vitiated in its origin.

The case was heard by the Additional First Class Subordinate

Judge of Ahmedabad, who passed the following decree in plaintiff's favour:

I therefore order that out of the sum of Rs. 61,419-3-1 claimed by the plaintiff, he (plaintiff) do recover Rs. 19,908-3-7 from defendants 1, 2, 3 and 4; that out of the remainder he do recover Rs. 13,723-1-8 from defendants 1, 2 and 4; that he do recover the rest, *viz.* Rs. 27,787-13-10, from defendants 1 and 2 only and from the property of Pathak Shanghavi and Company; that on all the above sums awarded to the plaintiff, he (plaintiff) do recover simple interest at 4½ per cent. from the date of this suit till the payment of the sums by the respective defendants; that the plaintiff is at liberty to recover from the fifth defendant the amount which he is entitled to recover from the fourth defendant. The plaintiff do recover his costs from all the defendants. Defendants to bear their own costs.

From this decree the present appeal has been preferred by the fourth and fifth defendants.

During the pendency of the appeal the plaintiff has died and his son the defendant Nagindas has been substituted in his place. To this order we will refer later.

The main contentions before us have been that the advances were made, not by the plaintiff, but by Nagindas, and that the guarantee is not binding. The first of these points has been urged before us by the appellant with great care and elaboration, but in view of the admissions that have been made, we think, so far as the facts go, it invites a simple solution. It is admitted on both hands that the advances were made out of the joint family funds of the plaintiff and the second defendant, who, as members of a joint Hindu family, were jointly interested in the firm of Gordhandas Bhagwandas. We think it therefore of little importance whose hand actually advanced the money, though, if it be a matter of any moment, we agree with the learned Judge in the Court below that the advance was actually made by Sheth Purshotamdas Chaturdas out of the firm's funds.

It becomes, however, a point of some difficulty to determine what are the legal consequences which flow from this. It is clear that Purshotamdas Chaturdas and Nagindas were the owners of the firm of Gordhandas Bhagwandas, so that *prima facie* the funds of that firm could only be recovered by a suit in which they both were plaintiffs—*Jugal Kishore* v. *Hulasi Ram*.[1] This is

(1) (1886) 8 All. 264.

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in accordance with the doctrine that where an individual is a common partner in two houses of trade no action can be brought by one house against the other house upon any transaction between them while such individual is a common partner. In illustration of this we may refer to *Bosanquet* v. *Wray*.(1)

This doctrine is founded on the elementary rule of procedure, too often disregarded in this country, that the same individual, even in different capacities, cannot be both a plaintiff and a defendant to one and the same action. While, however, at Common Law this rule led to the result we have indicated, the Courts of Equity surmounted this difficulty. Though they observed strictly the rule that a man cannot be both plaintiff and defendant, they did not allow it to stand in the way of doing justice between the parties; for provided all interested were before the Court either as plaintiffs or as defendants, they adjusted and determined their rights. This is aptly exemplified in *Luke* v. *South Kensington Hotel Company*.(2)

Similarly, we think the fact that Nagindas was interested both as creditor and debtor cannot stand in the way of our adjusting the rights of the parties in accordance with the enjoined rule of justice, equity and good conscience. To learn the goal to which that guiding principle should direct our steps it will be well to consider separately what the rights first of Purshotamdas, and then of Nagindas, would have been had the money advanced been in each case his alone. Now if Purshotamdas had been the sole creditor, he clearly could have recovered the amount in a suit properly framed for that purpose: had the advance been out of Nagindas' separate moneys, a suit to recover that money would not have lain; for one partner cannot sue for money lent by him to a firm of which he is a member, as the advance would be but an item in the partnership account.

This we think gives a clue to the proper equitable principle to be applied here. First, we must determine the shares in which Purshotamdas and Nagindas were interested in the firm of Gordhandas Bhagwandas. In some cases this might be a matter of considerable difficulty, but not in the present instance; for

(1) (1815) 6 Taunton 597. (2) (1879) 11 Ch. D. 121.

it is not questioned that the two were equally interested in this firm, and we think we are entitled to take that as the basis of adjustment.

That it is within the power of the Court to administer equity on these lines is, we think, to be inferred from *Piercy* v. *Fynney*.[1] Therefore we think there should in the lower Court have been a declaration that Purshotamdas and Nagindas were entitled to the amount advanced in equal shares and a decree, that one moiety thereof should be paid to Purshotamdas, and the other moiety treated as an item to the credit of Nagindas in the partnership accounts.

Now had that decree been passed, Purshotamdas during his life-time would have been entitled to execute the decree passed in his favour. On his death, however, the decree was transferred to Nagindas, so that under section 232 (*b*) of the Civil Procedure Code it would have been incapable of execution.

But if we pass this decree on appeal, section 232 (*b*) will have no application, and in that case *quoad* Purshotamdas' half share, Nagindas, one of the judgment-debtors, would be able to execute it, though he could not himself, according to the rule to which we have alluded, have sued originally for that part of the debt. The substitution of Nagindas in Purshotamdas' place made Nagindas both a plaintiff and a defendant, a position not ordinarily permissible. The result in this case is, that though Nagindas was equally liable with his co-partners, if we confirm the decree as it stands, he will, both as regards Purshotamdas' share and his own, be at liberty to execute the decree against any one of his co-partners.

In our opinion, therefore, we cannot, as things now stand, pass a decree in Nagindas' favour for payment to him of the amount due from the partners even in respect of Purshotamdas' share. We can only declare that for this amount too Nagindas is entitled to credit in the partnership accounts. It is true this is due to what has occurred since the decree of the lower Court, but it is open to this Court to vary a decree under appeal, not only for error, but also on grounds which have come into existence since

(1) (1873) L. R. 12 Eq. 69.

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it was passed—*Sakharam* v. *Hari*.[1] Subsequent events have placed Nagindas in the position of the sole plaintiff, and we can under the circumstances of this case only give him such relief as would have been possible had he occupied that position at the institution of the suit.

Bhagubhai, the third defendant, it is true, has contended before us, that as he left the partnership in October, 1895, the Judge erred in treating him as liable up to the following January. The ground of the decision is the rule prescribed in section 264 of the Contract Act, in reference to which the Judge held on the evidence that the plaintiff was not shown to have had notice of the dissolution before January. We see no ground for holding that the Judge's appreciation of the evidence was wrong, but the point does not now arise. Nagindas can only be entitled to credit in the partnership accounts as against those who actually were his co-partners from time to time; for section 264 merely operates in favour of strangers to the partnership. Obviously, however, this is a matter of no practical importance, if, as is alleged, the advances went to pay off indebtedness of the firm incurred while Bhagubhai was a partner: for in that event the rights and liabilities of the partners will be worked on the taking of the partnership accounts.

If this be the position so far as defendants 1 to 4 are concerned, how does defendant No. 5 stand? The case against him is that he is liable as a surety, and it is alleged that he gave Purshotamdas both an oral and a written guarantee. Defendant No. 5 denies the oral guarantee, and it is said, and we think rightly, that there is no distinct finding of the learned Judge in favour of the oral guarantee. As to the existence of the written guarantee there can be no question, but it is contended that it was obtained by a fraud which is a complete answer to any suit on it. The fraud imputed is twofold; first, it is said that defendant No. 5 was induced to sign the guarantee by a false misrepresentation of his son's determination to commit suicide unless freed from his pecuniary embarrassment, and secondly, that defendant 5 was

(1) (1881) 6 Bom. 113.

assured the letter of guarantee would be submitted to his brother Shapurji for approval before it was treated as operative.

Now it is obvious that the *onus* of establishing this plea was on defendant 5, and it was incumbent on him to make it out beyond dispute, as it involved a charge of fraud. The lower Court held that defendant 5 had not made out his case, and it is for us to say whether we can on the evidence hold that the charge of fraud is so clearly established as that we ought to reverse the Judge's finding of fact. The evidence has been sifted before us carefully and critically by Mr. Donald, but we are unable to say that the Judge's appreciation of the evidence is wrong. The witnesses were examined before him, and in a conflict of evidence any appeal Court must be slow to differ from the Judge's estimate as to the credibility of the witnesses examined before him. We therefore would not disturb the finding of the lower Court on this point.

We do not now propose to examine the evidence in detail, because it seems to us there is another ground which is fatal to the claim. Taking the guarantee as established we have to see what is its true construction. Mr. Inverarity has argued before us that though the fifth defendant thereby became liable for the whole debt of the partnership, that is so only because he guaranteed his son's obligation. We are not prepared to say that if this were so, it would make any difference; but in any case we do not so read the document: it is true Rustomji alone of the partnership is named, but we read the document as constituting defendant 5 directly a surety for the partnership debt. We start then with this, that defendant No. 5 was the surety and the partners were the principal debtors. But the liability of a surety is co-extensive with that of his principal debtor, therefore it follows from what we have already said that we cannot now pass a decree for payment against defendant No. 5. Nor does the matter rest there: in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee (Indian Contract Act, 1872, section 145). But Nagindas, the present beneficial owner of the debt, is one of the principal debtors, so that it is obvious by no equitable adjustment of rights can he be entitled to any relief

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against defendant 5, who stood surety for him. This no doubt was not the position of affairs when the decree of the lower Court was passed, but we have already dealt with this in an earlier part of our judgment and the same considerations are equally applicable here.

The conclusion, then, to which we come is that the judgment under appeal cannot stand, and in place of it there must be a declaration that Nagindas in the taking of the partnership accounts is entitled to credit for the amount advanced out of the funds of Gordhandas Bhagwandas and that the sums so advanced with interest thereon amount in all to Rs. 61,419-3-1. In determining how that amount is to be borne by the various partners regard must be had to the dates on which the amounts making up that total were advanced, and to the debts discharged thereby, and to the proportions in which the partners are liable to contribute. We do not disturb the decree of the lower Court as to costs: the appellants must bear half the costs of the respondent Nagindas in this Court.

*Decree varied.*

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## APPELLATE CIVIL.

*Before Mr. Justice Crowe and Mr. Justice Chandavarkar.*

1901.
*March 7.*

ATMARAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* UMEDRAM (ORIGINAL DEFENDANT 1), RESPONDENT.*

*Document—Alteration of a document—Material alteration—Material alteration in a written acknowledgment of a debt does not render it inoperative and ineffective—Limitation.*

The rule of English law that a material alteration of a document by a party to it after its execution without the consent of the other party renders it void, is in force in India.

This rule does not apply to documents which are not the foundation of a plaintiff's claim, but are merely evidence of a defendant's pre-existing liability.

A written acknowledgment of his liability by a debtor which is intended merely to save the bar of limitation and not to give a right of action is not within the rule.

* Second Appeal No. 579 of 1900.

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SECOND appeal from the decision of Khán Bahádur B. E. Modi, Additional First Class Subordinate Judge, A.P., of Surat, confirming the decision of Ráo Sáheb G. V. Saraya, Joint Second Class Subordinate Judge at Surat.

Suit to recover Rs. 2,524-11-6 in respect of a loan alleged to have been made by him on 20th November, 1888, to a partnership consisting of the first defendant and one Uttamram, the father of defendants 2, 3 and 4.

This suit was filed on the 30th March, 1898.

The plaintiff contended that the suit was saved from the bar of limitation as follows:—

He alleged that a part payment of Rs. 81-12 was made to him on the 11th April, 1891; that on the 2nd November, 1891, a *samadaskat* was passed to him by the debtors in which the sum of Rs. 2,366-10-6 was acknowledged to be then due; that in March, 1894, another part payment of Rs. 300 was made, the entry in his book relating to which was in the handwriting of defendant 1; that subsequent part payments were made by defendant 1, after allowing for which the balance of Rs. 2,524-11-6 remained due, which was the sum sued for.

In 1893 Uttamram (father of defendants 2, 3 and 4) died, but his sons continued the partnership with defendant 1.

Defendant 1 pleaded that the suit was barred by limitation. He alleged that the loan was made, not on the 20th November, 1888, as alleged in the plaint, but on the 2nd November, 1888 (Kartik Sud 1, 1945). He denied that any part payment was made on 11th April, 1891. He alleged that the *samadaskat* was passed, not on the 2nd November, 1891, but on the 11th November, 1891, and that the plaintiff had fraudulently altered the date to the 2nd November, 1891, in order to save the bar of limitation. He contended that this was a material alteration which rendered the document null and void; that the entry of part payment of Rs. 300 was not in his handwriting and consequently did not give a fresh starting point of limitation, and that the claim was therefore time-barred.

Defendants 2 to 4 denied their liability and also pleaded limitation.

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The Court of first instance held that the date of the *samadaskat* had been altered without the knowledge and consent of the defendants; that this was a material alteration which vitiated the document, and that the claim was time-barred. Plaintiff's suit was therefore dismissed.

This decision was upheld in appeal by the Additional First Class Subordinate Judge, A.P.

Against this decision plaintiff preferred a second appeal to the High Court.

*L. A. Shah* for appellant (plaintiff):—The alteration in the date of the *samadaskat* is not a material alteration. It is not shown that it was made by the plaintiff fraudulently and subsequently to the execution of the document. Having regard to the date of the original loan and of the *samadaskat*, the alteration is not prejudicial to the defendant. Further, we submit that a material alteration does not vitiate a document for all purposes. Where a document forms the very basis of the suit, the action may fail if the document is found to be materially altered. But the case is otherwise where a document is merely evidence of pre-existing liability. The *samadaskat* in the present case was admittedly passed by the defendant, acknowledging his liability for the balance due. It does not form the basis of our suit. An alteration in such a document does not render it inoperative—*Ramasamy* v. *Bhavani*(1); *Gogun Chunder* v. *Dhuronidhur*(2); *Christacharlu* v. *Karibasayya*(3); *Ganga Ram* v. *Chandan Singh*(4); *Paramma* v. *Ramachandra*.(5)

*G. S. Rao* for respondent (defendant 1):—The general principle of law is that a material alteration in a document vitiates it and renders it inoperative if made without the consent of the other party. In the present case the date of the *samadaskat* is found by both the Courts below to have been altered while the document was in plaintiff's possession. The alteration affects the liability of the defendant, as it extends the time within which the

(1) (1866) 3 Mad. H. C. R. 247.
(2) (1881) 7 Cal. 616.
(3) (1885) 9 Mad. 399.
(4) (1881) 4 All. 62.
(5) (1883) 7 Mad. 302.

plaintiff is entitled to sue. This alteration is a material alteration and vitiates the document *in toto* — *Govindasami* v. *Kuppusami*.[1] It falls therefore within the principle laid down in the leading case of *Master* v. *Miller*.[2] An alteration in a document stating a falsehood is a material alteration—*Ganga Ram* v. *Chandan Singh*.[3] Even where the alteration is not prejudicial to the defendant, it has been held that if it is made while the document is in plaintiff's custody, it vitiates the document altogether—*Gardner* v. *Walsh*.[4]

CHANDAVARKAR, J. :—This was a suit brought by the plaintiff on the 30th March, 1898, to recover the sum of Rs. 2,000 with interest, which, he alleged, had been lent to defendant No. 1 and the father of defendants 2 to 4 on Kartik Vad 2nd, Samvat 1945 (*i.e.* 20th November, 1888). To bring his claim within limitation, the plaintiff relied on certain payments and acknowledgments which form the main points for consideration in this second appeal. Both the lower Courts have held the claim not proved against defendants 2 to 4, so that we are concerned now with the question of the liability of defendant No. 1 alone, and it is against him that the present appeal is levelled.

The first point in dispute between the parties is as to the date of the original loan. The plaintiff alleges that it was advanced on Kartik Vad 2nd, Samvat 1945 (*i.e.* the 20th of November, 1888), whereas the case of defendant 1 is that it was advanced on Kartik Sud 1st, Samvat 1945 (*i.e.* the 2nd November, 1888). The Joint Second Class Subordinate Judge at Surat, who tried the suit, did not go into that question, but rejected the claim of the plaintiff on other grounds. The Additional First Class Subordinate Judge, who heard the appeal, raised an issue on the point, but though he was "inclined to believe on the evidence of plaintiff and his neighbour Fakirchand, corroborated by plaintiff's *thámkháta* or ledger account, that the loan was advanced on Kartik Vad 2nd, Samvat 1945," yet he did not consider the question important and deemed it unnecessary to record his finding upon the issue, because in his opinion the plaintiff's case must fail on

(1) (1889) 12 Mad. 239.
(2) Smith's L. C. Vol. I. 10th Ed, p. 777.
(3) (1881) 4 All. 62.
(4) (1855) 24 L. J. Q. B. pp. 285 at p. 288

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the ground that the acknowledgment of Samvat 1948, relied upon by the plaintiff to save the bar of limitation having been materially altered, was inoperative.

The acknowledgment is a *samadaskat* and forms part of Exhibit 55. In his plaint the plaintiff averred that this acknowledgment had been made on Kartik Sud 1st Monday, Samvat 1948 (*i.e.* the 2nd November, 1891). The first defendant, on the other hand, alleged in his written statement that it had been made on Kartik Sud 10th or 11th (the 11th of November, 1891), and that it had been altered from the latter date to the former. Neither of the Courts below has come to any definite conclusion as to the date on which the acknowledgment was made, because they hold that as the date of the acknowledgment has been tampered with there has been a material alteration which vitiates the document. The Second Class Subordinate Judge conjectured "that the *samadaskat* was passed on Kartik Sud 1st." The Additional First Class Subordinate Judge in appeal felt inclined to take the same view. But they both held that in any case, whether the alteration was, as suggested by the plaintiff, from the 2nd of November, 1891, to the 11th of November, 1891, or, as suggested by the first defendant, from the 11th of November to the 2nd of November, 1891, as the acknowledgment had been materially altered, it was void, according to the principle of the rulings in *Govindasami* v. *Kuppusami*[1] and *Gogun* v. *Dhuronidhur*.[2]

The principle of English law, which was first laid down in *Pigot's case*,[3] that the material alteration of a document by a party to it after its execution without the consent of the other party renders it void, has been followed in India. But all the decisions which have been cited at the Bar from the English and the Indian Law Reports relate to cases in one and all of which the *altered* instrument was the foundation of the plaintiff's claim and the source of the defendant's obligation or liability. They were cases of written contracts, or bonds or bills of exchange or similar instruments, as to which it may be taken as settled law both in England and here that a material alteration avoids the

(1) (1889) 12 Mad. 239. (2) (1881) 7 Cal. 616.

(3) 9 Rep. 266, 11 Rep. folio 27*a*.

instrument where the action is on the instrument itself: see *Agricultural Cattle Insurance Company* v. *Fitzgerald*.(1) The decisions cited in the notes to the case of *Master* v. *Miller* in Smith's Leading Cases also make that clear. As pointed out in the case of *Earl of Falmouth* v. *Roberts*,(2) there is a distinction between cases in which the altered instrument is merely evidence and those in which the obligation sought to be enforced is by reason of the instrument itself. "The rule of law," said Parke, B., in that case, "applies where the obligation is by reason of the instrument." To the same effect was the principle of *Pigot's case* construed by Campbell, C.J., in *Gardner* v. *Walsh*.(3) But even as to that Courts in England have ruled in some cases that under certain circumstances and for certain purposes the altered instrument may be looked at to see the real terms of the contract. (See *Pattinson* v. *Luckley*(4).) But no case has been cited to us nor have we been able to find any in which it has been laid down either in England or here that a written acknowledgment of his liability by a debtor becomes void and inoperative if it is materially altered without his consent by his creditor. An instrument which creates a liability and gives rise to a cause of action is one thing and a written acknowledgment of that liability is another. The distinction between the two was clearly pointed out by their Lordships of the Judicial Committee of the Privy Council in *Gopekishen Goshamee* v. *Brindabunchunder Sircar Chowdhry*.(5) Their Lordships said :—"The authorities which have been mainly relied upon in order to show that there has not been a sufficient acknowledgment within the period of limitation in the present case were cases of actions on promises, decided on the Statutes of the 21st Jac. 1 and the 9th Geo. IV. c. 14. The principle of these decisions is not applicable to a case like the present. They depend not upon the effect of an exception in the Statute, but upon the principles of the Common Law with respect to the cause of action. The issue joined made it incumbent on the plaintiff to prove a promise made within six years and such as to agree with that laid in the declaration. In such cases, acknowledg-

(1) (1851) 16 Q. B. 432 pp. 440-441.
(2) (1842) 9 M. & W. 469.
(3) (1855) 56 & B. 83 at p. 91.
(4) (1875) L. R. 10 Ex. 330.
(5) (1869) 13 Moore's I. A. 37.

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ments, whether by words or acts, are of no avail save so far as they sustain the promise alleged: there is no exception within which they come: and these cases are to be regarded simply as actions brought on promises made within six years. But the cases within which acknowledgments are operative by way of exception are of a different character. In these the action must be maintained on the original security: and an acknowledgment within the prescribed period of limitation shows that the obligation was then subsisting and unsatisfied: a promise to pay is not required." And further on their Lordships go on to say: "It is one thing to acknowledge a debt and another to promise to pay it, and this distinction is recognized by the terms of the law relied on by the defendant." The decisions on the sufficiency of acknowledgments within the exceptions in recent Statutes of Limitation have (as Sir Edward Sugden has observed) "proceeded on a liberal but yet a fair and just construction of those Statutes."

A written acknowledgment then is merely evidence of the original liability which it seeks to keep alive. According to section 19 of the Limitation Act, all that is necessary to make it evidence is that it should be "made in writing signed by the party against whom such property or right is claimed or by some person through whom he derives title or liability." It may be contained in a deed or a letter or a deposition or an affidavit or in any other form. Having regard then to the provisions of the Limitation Act, we think that a written acknowledgment, which is intended to save the bar of limitation and not to give a right of action, does not come within the principle laid down in the decisions following the rule in *Pigot's case*. In the case before us what is relied on as an acknowledgment under section 19 of the Limitation Act is a *samadaskat*, as to which it has been held that it is merely an admission of a balance due and is receivable in evidence, though unstamped: see *Dhondu* v. *Narayan*.[1] As soon as the acknowledgment is made, the Statute of Limitation says that it shall have the effect of prolonging the period of limitation and there is neither reason nor principle for extending the rule as to material alterations in a deed to it and undoing

(1) (1863) 1 Bom. H. C. 47.

that effect. In the case of a deed, said Bramwell, B., in *Pattison* v. *Luckley*[1], "where a person claiming to be paid for work did the work under an instrument of contract, that instrument, though altered in a material part, is still the governing document to determine the rights of the plaintiff." Equally where a statute attaches a legal incident to an instrument, that instrument, though altered, must continue to be the governing document for the purposes of the statute. It is true that the reason of the rule laid down in *Pigot's case* has been pointed out to be the fraud or laches of the party altering the deed or instrument or allowing it to be altered while it was in his custody. But in no case has the fraud been held to vitiate every document which is adduced merely as evidence in support of a claim or contention. If the rule were extended indiscriminately in the way we are asked to extend it here to all documents which are put in merely as evidence, it would operate harshly and shut out true, because it is altered, into false evidence. The rule has been borrowed from the English cases by our High Courts and applies to bonds or other instruments creating *per se* rights and liabilities on the ground that it is consistent with justice, equity and good conscience. But we do not think that the rule of justice, equity and good conscience requires that it ought to be carried further and applied to documents which are not the foundation of a plaintiff's claim but are merely evidence of a defendant's pre-existing liability.

The acknowledgment being then operative, the question is—what is the date on which it was passed? The lower Court has indeed discussed that question in its judgment and given some reasons for holding that the original date is that given by the plaintiff, *i.e.* Kartik Sudh 1st, Monday (the 2nd of November, 1891), but it is clear that the Court did not mean to come to any distinct conclusion on that question of fact, because, though it raised the 9th point to cover that question, yet it has not recorded any finding on it on the ground that a finding is unnecessary. We must therefore send back the case for a distinct finding on the 9th point raised in the lower appellate Court. That point includes the question as to the date of the

(1) (1875) L. R. 10 Ex. 330.

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loan by the plaintiff to the defendant. In determining this latter point, we would ask the Court to bear in mind with reference to the respondent's contention that the plaintiff's *thámkhâta* or ledger account is not admissible because it was not written at or about the time of the loan, the recent ruling of the Privy Council in *Deputy Commissioner of Bara Banki* v. *Ram Parshad*,(1) where (differing from *Munchershaw Bezonji* v. *The New Dhurumsey Spinning and Weaving Company*(2)) their Lordships have held that an account to be "regularly kept" within the meaning of section 34 of the Evidence Act need not be written from day to day or hourly as the transactions have taken place and that the time of making the entries may affect the value of the accounts but cannot affect their admissibility.

In order to enable this Court to dispose of the case finally, the lower Court should also find whether, as evidenced by the credit entry of Rs. 81-12-0 in the plaintiff's *thámkhâta* or ledger account of Chaitra Sudh 3rd, Samvat 1947 (*i.e.* 11th April, 1891), the plaintiff received the said amount on that date as alleged by him, and whether the entry is in the handwriting of defendant No. 1. The reasons given by the lower Court for not determining the question are not sound in law. Though the plaintiff did not specifically rely upon this entry in those paragraphs of his plaint where he showed the ground upon which he claimed exemption from the ordinary period of limitation, yet he did mention it in paragraph 3 of it, and we think that there was a substantial compliance with the spirit, if not with the letter, of section 50 of the Code of Civil Procedure. There is no justification whatever for the lower appellate Court's remark that this entry was not relied upon by the plaintiff "throughout the trial in the first Court." The plaintiff in his deposition swore that the entry was in the handwriting of defendant No. 1 and had been made in his (plaintiff's) presence. Defendant No. 1 was examined about it and the Second Class Subordinate Judge refers to it in his judgment. It was not indeed mentioned in so many words in the grounds of appeal to the District Court by the plaintiff; nor was the entry of Rs. 300, which the lower Court has found to be

(1) (1899) 27 Cal. 118. (2) (1880) 4 Bom. 576.

genuine, mentioned in those grounds. The third ground of appeal, which relates to payments and acknowledgments made by defendant No. 1, raised the question as to all of them. As to the other payments alleged to have been made by the defendant, the lower appellate Court has found the first credit entry of Rs. 300 to be proved and in the handwriting of the defendant and the other entries are admitted to be in his handwriting by the defendant. We must take them to be payments under section 20 of the Limitation Act.

We must therefore send the case back to the lower appellate Court for distinct findings on the following issues :—

1. What is the date of the loan advanced by the plaintiff to the defendant ?

2. Is the credit entry of Rs. 81-12 in Exhibit 32 in defendant No. 1's handwriting, and is it an entry of payment under section 20 of the Limitation Act ?

3. What is the date on which the written acknowledgment in Exhibit 55 was passed by defendant No. 1 ?

Findings to be returned within a month.

*Issues sent down.*

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## APPELLATE CIVIL.

*Before Sir L. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.*

VINAYAK GANGADHAR BHAT (ORIGINAL DEFENDANT), APPELLANT, *v.* KRISHNARAO SAKHARAM ADHIKARI (ORIGINAL PLAINTIFF), RESPONDENTS.*

1901. *March* 12.

*Small Cause Court—Jurisdiction of—Question of title—Provincial Small Cause Courts Act (IX of 1887), section 23—Claim to possession of land when title to land disputed—Second appeal—Civil Procedure Code (XIV of 1882), section 586—Practice.*

The plaintiff sued to recover Rs. 75 as the *utpan* (income) of certain lands. In his defence the defendant raised the question of the title to the land. The plaintiff obtained a decree, which was confirmed in appeal.

*Held*, that the suit, although raising the question of title, was a suit cognizable by a Small Cause Court, and that therefore under section 586 of the Civil Procedure Code (XIV of 1882) no second appeal lay.

* Second appeal No. 92 of 1900.

1901.

VINAYAK v. KRISHNARAO.

SECOND appeal from the decision of Ráo Bahádur M. R. Nadkarni, Additional First Class Subordinate Judge, with appellate powers at Ratnágiri, confirming the decree of Ráo Sáheb G. D. Deshmukh, Second Class Subordinate Judge of Dápoli.

Plaintiff sued the defendant to recover income arising from land for 1894. He alleged that the land was kowli land and had come to him from his father, and that the defendant's father had wrongfully collected the profits for the said year.

The defendant pleaded that by a prior decree the land had been declared to be *khoti* and not *kowli*, and that under section 244 of the Civil Procedure Code (XIV of 1882) the plaintiff's claim should have been made in the execution proceedings of that decree under which the defendant had possession.

The Subordinate Judge allowed the claim. The defendant appealed and the lower Court's decree was confirmed.

The defendant preferred a second appeal to the High Court.

At the hearing the respondent (plaintiff) took the preliminary objection that under section 586 of the Civil Procedure Code (XIV of 1882), no second appeal was permitted, the suit being one cognizable by a Small Cause Court.

*C. H. Setalvad* (with *N. V. Gokhale*) for the respondent (plaintiff):—The appellant has no second appeal to this Court: section 586 of the Civil Procedure Code (XIV of 1882). The suit is one cognizable by a Small Cause Court, being one to recover Rs. 75 as money had and received or as mesne profits wrongfully received by the defendant (appellant)—*Krishna Prosad* v. *Maizudden Biswas* [1] *Kunjo Behary* v. *Madhub Chundra*.[2] Paragraph 31 of the Provincial Small Cause Courts Act (IX of 1887) applies to suits involving accounts. Here no account is necessary. *Narayan Bhaskar* v. *Balaji*[3]; *Kali Krishna* v. *Izzatannissa*.[4] As to paragraph 31 schedule 2 of Act IX of 1887, see *Kunjo Behary* v. *Madhub Chundra*.[5] No question of title to land is really raised in this suit. The defendant improperly raised it. That circumstance does not prevent the suit being a Small Cause Court suit.

(1) (1890) 17 Cal. 707.
(2) (1896) 23 Cal. 884.
(3) (1895) 21 Bom. 248.
(4) (1897) 24 Cal. 557.
( ) (1896) 23 Cal. 884.

and within the jurisdiction of the Small Cause Court—*Dulabh* v. *Bansidhar Rai* (1); *Bapuji* v. *Kuvarji*.(2) In England questions of title are litigated in suits for money had and received—*Monypenny* v. *Bristow*.(3)

*Branson* (with *Daji A. Khare*) for the appellant (defendant 1). —We rely on paragraph 31 schedule 2 of Act IX of 1887.

JENKINS, C.J. :—The plaintiff has brought this suit to recover Rs. 75, or such sum as may be found due to him on account of the *utpan* of the lands described in the plaint collected in 1894-95.

His case is that these lands were originally acquired from Government, and ultimately under that title became vested in him: or, in other words, that they are his *kowli* lands: that though the lands are thus his, the defendant's father wrongfully collected the *utpan*: and it is this *utpan* he now seeks to recover.

The defence, or so much of it as is now material, is that the lands are *khoti* and not *kowli*, and that this is established beyond the possibility of controversy by reason of a prior decree: and next, that the point the plaintiff desires to raise should have been advanced in execution proceedings under that decree. It becomes therefore necessary to see what that decree is, and what led up to it.

In 1816 Laxman Govind Bhat obtained a *kowl* of the land from the Subhedár of Fort Suvarndrug, and on the 10th of February, 1827, Laxman sold his one-half share to Ramchandra Apaji Adhikari, who had already acquired the other half. These lands are situate within the boundaries of the *khoti* village of Umbershet. The *khoti* of this village at one time belonged half to the Bhat family and half to the Fadkes, but the managing member, Govind Hari Bhat, leased the 16 annas to the predecessors in title of the plaintiff. Later, the plaintiff alleges, his predecessor acquired 4 of the Fadkes' 8 annas, and went into management. Then a suit, No. 47 of 1888, was brought

(1) (1884) 9 Bom. 111. (2) 1890) 15 Bom. 400.
(3) (1830) 2 R. & M. 117.

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against the successors of the original lessee to get back the village and a decree for possession was passed. The appellant alleges that in execution of that decree possession was obtained of the present plaint lands, and on this ground he claims that the plaintiff should have proceeded under section 244 of the Civil Procedure Code, and that failing this the suit is effectually barred by the plea of *res judicata*.

The respondent, however, by way of preliminary objection has urged that the appeal is barred by section 586 of the Civil Procedure Code. To this it was answered that this suit was not of the nature cognizable in Courts of Small Causes, for it fell within the description of either the 11th or the 31st paragraph of the second schedule to the Provincial Small Cause Courts Act. The point thus raised in this preliminary objection appears to me to be fraught with difficulties. It is clear that a Small Cause Court cannot entertain a suit for the determination or enforcement of any right to or interest in immoveable property, but the authorities decide that having regard to section 23 of the Provincial Small Cause Courts Act a Court of Small Causes can entertain a suit, the principal purpose of which is to determine a right to immoveable property, provided the suit in form does not ask for this relief, but for payment of a sum of money. What is the result of this? A sues B for a sum of money under Rs. 500, his right to which depends exclusively on his establishing his ownership of a piece of land. According to the cases a Court of Small Causes can itself hear the case, and in the course of it determine the issue of ownership. There would be no second appeal, but, on the other hand, the decision on the issue of ownership would not be *res judicata* in a subsequent suit to determine the ownership, because the Small Cause Court would not be competent to try the subsequent suit. But suppose the Small Cause Court, acting under the powers contained in section 23 of the Provincial Small Cause Courts Act, returned the plaint, and it was afterwards presented to a Court having jurisdiction to determine the title, what then would be the position? According to the decision in *Kali Krishna Tagore* v. *Izzatannissa Khatun*[1] no second appeal

(1) (1897) 24 Cal. 557.

would lie. Yet as the Court where the plaint was ultimately presented was a Court of jurisdiction competent to try the question of title, its finding on the issue of ownership would, according to *Rai Charan* v. *Kumud Mohun*,(1) give rise to the plea of *res judicata*. The result then would be this, that the right of the litigant to have his claim of title determined in this Court on second appeal would depend upon whether or not the Court of Small Causes in the exercise of its discretion acted under section 23 of the Provincial Small Cause Courts Act or not. It is difficult to suppose that the Legislature could have intended such a result. There is but one further case to consider, and it is where, as here, the plaint is presented in a Court having both ordinary and Small Cause Court jurisdiction. In *Narayan* v. *Balaji*(2) it was held that such a suit was cognizable by a Court of Small Causes, and that therefore no second appeal would lie. But as the Court in such a case was not a Court of Small Causes, it would, or at any rate might be a Court of jurisdiction competent to try a suit brought expressly for determining the right to the immoveable property, so the finding on the issue of ownership (which would not be subject to second appeal) would by the same process of reasoning be a bar to a subsequent suit for determining the right to the property where there would be a second appeal. In other words, a party might in this way be deprived of his right to have his claim to immoveable property determined in the High Court. This again appears to me to be a result that could not have been intended. This line of reasoning, it is true, depends upon the correctness of the view expressed in *Rai Charan's case*, and no doubt the authorities in this Court (e.g. *Bholabhai* v. *Adesang*(3) as well as in the Madras High Court) are the other way, but I must confess that the Calcutta decision appears to me to be more in consonance with the words of section 13 of the Civil Procedure Code.

It is enough for my purpose to indicate the difficulties that present themselves in connection with cases such as the one in hand. These difficulties would never have arisen had the Courts

(1) (1898) 25 Cal. 571. (2) (1895) 21 Bom. 248.
(3) (1884) 9 Bom. 75.

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here, when borrowing from the English procedure the form of actions in *assumpsit*, observed the limitations to which the action was there subjected. It is there well established that where rents have been demanded and collected under an adverse title, and without any assumption of agency, no action can be brought to recover the amount of those rents as a debt or on *assumpsit*, unless the claimant establish his title by proper proceedings, if they still be open to him. This rule was first enunciated as far back as 1788 in *Cunningham* v. *Lawrents*,[1] and has since been repeatedly affirmed, as for instance in *Clarance* v. *Marshall*[2], in *Monypenny* v. *Bristow*[3] and in *Talbot* v. *Earl of Shrewsbury*.[4] I have referred to these out of the many cases there are on this subject, as they show how the doctrine has been adhered to at different periods of time. This rule of procedure seems to me to be based on sound policy: it affords a safeguard against multiplicity of suits, and protects a man against the harassment of constant litigation. If such a rule obtained in this Court, it would be a simple and conclusive solution of the difficult points to which I have alluded, but in the face of existing decisions it now could only be adopted by the decision of a Full Bench. In some future case the point may be worthy of consideration, but in the present it would serve no useful purpose to put the parties to the additional trouble and delay involved in a reference to a Full Bench, as even if we could entertain the second appeal, it would, on the materials before us, probably only result in an affirmance of the lower Court's decree.

In the present state of the authorities the preliminary point is a good one, and we consequently must dismiss the appeal on it and not on the merits. The appellant must pay the costs.

CHANDAVARKAR, J.:—I concur.

*Appeal dismissed.*

(1) (1788) 1 Bacon's Abridgment, 344 (6th Ed. p. 260).
(2) (1834) 2 C. & M. 495. (3) (1830) 2 R. & M. 117.
(4) (1872) L. R. 14 Eq. 503.

# APPELLATE CIVIL.

*Before Sir L. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.*

MAGANLAL MULJI (JUDGMENT-DEBTOR), APPLICANT, *v.* DOSHI MULJI BHAICHAND AND ANOTHER (AUCTION-PURCHASERS), OPPONENTS.*

1901. *March* 29.

*Civil Procedure Code (Act XIV of 1882), section 310A and section 244—Property privately sold by judgment-debtor prior to Court sale—Application by judgment-debtor to set aside a Court sale—Application rejected—Application to High Court under section 622—Practice.*

In execution of a decree passed against a judgment-debtor, his property was sold by auction. Prior, however, to the execution sale, he effected a private sale to another person, and out of the proceeds he paid off the judgment-creditor, who duly certified that the decree was satisfied. Subsequently the judgment-debtor applied under section 310A to set aside the execution sale. His application was refused by the Judge on the ground that, at the date of the execution sale, he had no interest in the property, having disposed of it by private sale. He held, therefore, that he could not apply under section 310A. Against this order the judgment-debtor applied to the High Court under section 622 of the Civil Procedure Code (XIV of 1882). It was contended (1) that the order was one under section 244 of the Civil Procedure Code; that an appeal lay from an order under that section, and that therefore he had no right of application under section 622, and (2) that he having disposed of his property by private sale, section 310A did not apply.

*Held*, that section 244 did not apply, inasmuch as the auction-purchaser certainly could not be taken to be the representative of the decree-holder, and even assuming him to be a representative of the judgment-debtor, that section did not apply to a question between a party to the suit and his representative. Section 244 therefore did not apply to the order complained of, which was consequently not appealable, for an order under section 310A is only appealable so far as it comes under section 244 (*c*). There being no appeal, the judgment-debtor could therefore apply under section 622 of the Code.

(2) Notwithstanding the private sale, the judgment-debtor could apply under section 310A of the Code to set aside the execution sale.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, XIV of 1882) against the order of Ráo Sáheb Atmaram J. Kaji, Subordinate Judge of Umreth, in an execution proceeding.

The applicant, a judgment-debtor, applied to the Subordinate Judge of Umreth, under section 310A of the Civil Procedure Code

* Application No. 40 of 1901 under the Extraordinary Jurisdiction.

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(XIV of 1882), to set aside the sale of his immoveable property which had been sold in execution of the decree passed against him.

It appeared that on the very day of the Court sale the applicant had effected a private sale of the property, and out of the proceeds had paid to the judgment-creditor the amount due under his decree, and that the latter had duly acknowledged the satisfaction of the decree.

The execution sale, however, had nevertheless taken place and the opponents had purchased the property.

The applicant (judgment-debtor) now applied under section 310A of the Civil Procedure Code (XIV of 1882) to set aside the execution sale.

The opponents (purchasers at the execution sale) opposed the application, contending that the applicant was not entitled to apply under the said section, inasmuch as at the time of the execution sale the property did not belong to the applicant, inasmuch as he had previously sold it.

The Subordinate Judge dismissed the application on the ground that at the time of the execution sale the applicant had no interest in the property, and that section 310A was intended for the benefit of the judgment-debtor himself and not for the benefit of a person who had previously purchased the property from him.

The applicant obtained a rule *nisi* from the High Court under section 622 of the Civil Procedure Code (XIV of 1882) calling upon the opponents (purchasers at the execution sale) to show cause why the above order of the Subordinate Judge should not be set aside.

The opponents contended (1) that this question was one under section 244 of the Civil Procedure Code, and that as from an order made under that section an appeal lay, the applicants were not entitled to apply to the Court under section 622 of this Code. (2) That the applicants had no *locus standi* under section 310A.

*Gokuldas K. Parekh* for the opponents showed cause:—We raise a preliminary objection to this application. It is an application under section 622 of the Civil Procedure Code. We submit that as an appeal lies against the order which the applicant seeks to set aside, he cannot apply under section 622.

The order of the lower Court was passed under section 244 (*c*) of the Civil Procedure Code. An appeal is given against such an order. Therefore the present application under section 622 cannot be entertained. The application to get the Court sale set aside raises a question between the parties to the suit in which the decree was passed or their representatives relating to the execution of the decree, and therefore the order of the lower Court is covered by section 244 (*c*). We rely upon *Pandurang* v. *Krishnabai*,[1] *Prosonno Coomar Sanyal* v. *Kasi Das Sanyal*.[2]

Further, on the merits, the judgment-debtor having sold his interest in the property, he is not a party interested within the meaning of section 310A of the Civil Procedure Code and has no *locus standi* under the section to have the sale set aside. The case relied on by the Judge supports our view.

*Lallubhai A. Shah* for the applicant in support of the rule :— The order of the lower Court does not fall within the terms of section 244 (*c*) of the Code, and is therefore not appealable. In the case of *Pandurang* v. *Krishnabai*[3] there was a question between the auction-purchaser and the judgment-creditor. In the present case the judgment-creditor is not a party to the proceedings and an auction-purchaser is not in any way a representative of the judgment-creditor. Further, the question regarding the setting aside of the sale does not relate to the execution of the decree. The Privy Council ruling in *Prosonno Coomar Sanyal* v. *Kasi Das Sanyal*[4] does not touch the present point and is no authority for the proposition that the order in question is covered by the terms of section 244 (*c*).

On the merits the order of the Judge is clearly wrong. The judgment-debtor has certainly a *locus standi* to apply under section 310A in spite of his having effected a private sale of his property during the pendency of the attachment proceedings. The private sale would not become operative unless and until the auction sale is set aside. See sections 276 and 310A. The decision relied on by the Judge does not show that the judgment-debtor has no *locus standi* under the circumstances of the present

(1) (1899) P. J. p. 51.
(2) (1892) 19 I. A. 166 ; 19 Cal. 683.
(3) (1899) P. J. p. 51.
(4) (1892) 19 I. A. 166.

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case. The *ratio decidendi* in *Ramchandra Dhondo* v. *Rakhmabai*[1] clearly supports our contention.

JENKINS, C.J. :—In execution of a decree immoveable property has been sold, and the judgment-debtor has applied under section 310A of the Civil Procedure Code to have the sale set aside. The application has been rejected by the Second Class Subordinate Judge at Umreth, and the judgment-debtor now asks us to interfere under section 622 of the Civil Procedure Code.

Prior to his application the judgment-debtor sold his interest in the property to a third party, and with the purchase-money the decree-holder's claim was paid and satisfaction certified. Under these circumstances the auction-purchaser at the execution sale objects that no application under section 622 will lie as there is an appeal under section 244 of the Civil Procedure Code, and further, that the judgment-debtor has no *locus standi* under section 310A.

Does section 244(*c*) apply? It may be conceded that we have here a question "relating to the execution, discharge or satisfaction of the decree or the stay of execution thereof." That, however, is not enough: it must also be a question "arising between the parties to the suit in which the decree was passed or their representatives." But clearly no question here arises between the parties to the suit, so that we have to determine the force of the words "or their representatives."

The opponent, in support of his objection, relies on the judgment of the Privy Council in *Prosonno Coomar Sanyal* v. *Kasi Das Sanyal*.[2] There is a tendency to suppose that this decision has struck out of the section the words "arising between the parties to the suit . . . or their representatives," so that it is important to see what precisely was decided there.

Their Lordships stated with approval that the result of the decisions was that "when a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is no party to the suit is interested in the result has never

(1) (1898) 23 Bom. 450. (2) (1892) L. R. 19 I. A. 166; 19 Cal. 683.

been held to be a bar to the application of the section." It is clear, therefore, that their Lordships did not hold the auction-purchaser to be a party or a representative: they merely held that his interest in the result did not prevent the question being one between parties. This is made even more apparent by the cases to which their Lordships refer. Thus in *Kuriyali* v. *Mayan*[1] it was said:

> And section 244 (*c*) expressly prohibits any separate suit regarding questions arising between the parties to the suit in which a decree has been passed, or their representatives, and relating to the execution of the decree. The question whether the property mentioned in the decree was available for execution is such a question, and it arose between the decree-holders and this plaintiff, who had been made a party to the decree as the judgment-debtor's representative.

So in *Sakharam* v. *Damodar*,[2] where an auction-purchaser was interested and a party, it was said:

> The Subordinate Judge was also wrong in referring the judgment-debtor to a suit, inasmuch as the relief sought by him, *at all events as against the judgment-creditor*, could only be obtained on an application of the kind contemplated in section 244 (*c*) of the Code of Civil Procedure.

Now here the question is simply between the judgment-debtor and the purchaser of his interest in the land: and can it be said that the auction-purchaser is the representative of a party? Certainly not of the decree-holder: therefore he can only claim to be a representative of the judgment-debtor. I doubt whether he can claim this character, but assuming, for the sake of argument, he can, it would not aid him; for in our opinion the section does not cover a question between a party to the suit and his representative. Therefore we have not the necessary basis for the application of section 244, and as a consequence we hold no appeal lies, because it is only so far as an order under section 310A comes under section 244(*c*) that it is appealable.

But if no appeal lies, then section 622 applies, so that we must next have to see whether, notwithstanding the private sale, the judgment-debtor has a *locus standi*. In execution under Chapter XIX it is only property of the judgment-debtor that can be attached and sold, so that the petitioner seems to me to answer

(1) (1883) 7 Mad. 255. (2) (1885) 9 Bom. 468.

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the description of a "person whose immoveable property has been sold under this chapter," notwithstanding his private sale. Moreover, it is to be noticed that "when an attachment has been made . . . any private alienation of the property attached . . . shall be void against all claims enforceable under the attachment."

For these reasons we think we can interfere and ought to make the rule absolute with costs in both the Courts on the opponents.

*Rule made absolute.*

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## CRIMINAL REFERENCE.

*Before Mr. Justice Candy and Mr. Justice Fulton.*

1901.

*April 1.*

KING-EMPEROR *v.* THE CHIEF OFFICER OF THE S.S. "MUSHTARI."*

*Jurisdiction—High seas—Offence committed on the high seas—Procedure—Penal Code (Act XLV of 1860)—37 and 38 Vict., chapter 27, section 3.*

A Presidency Magistrate has authority to charge, convict and sentence under the Indian Penal Code (Act XLV of 1860) a person who has committed an offence in a British ship during her voyage on the high seas. The law applicable both as regards procedure and punishment is the Indian law.

REFERENCE by Khán Bahádur P. H. Dastur, Third Presidency Magistrate, Bombay. The reference was as follows:

"I have the honour to refer for the opinion of the High Court the following question of law which has arisen in a case now pending in this Court.

"Has the Presidency Magistrate, Bombay, authority to convict a person for an offence under the Indian Penal Code, the said offence having been committed in a British ship during her voyage on the high seas?"

The facts of the case briefly are as follow:

"The chief officer of the S.S. 'Mushtari,' a ship belonging to the Bombay and Persian Steam Navigation Company, Limited, is charged with criminal breach of trust as a servant (under

* Criminal Reference No. 16 of 1901.

section 408 of the Indian Penal Code) in that he received passage money from a pilgrim during the ship's voyage between Bandar Abbas and Bushire. The ship is proved to be a British ship, and by the combined effect of Acts 12 and 13 Victoria, chapter 96, and 23 and 24 Victoria, chapter 88, any Magistrate in British India has power to try the chief officer for an offence committed on the high seas ; the only proviso being that the person convicted shall be liable to the same penalty as is provided for by the law of England.

"Now my difficulty in the present case is whether I should record a conviction under section 408 of the Indian Penal Code against the chief officer, and then pass a sentence provided for by the law of England for embezzlement, or whether I should frame a distinct charge under the English law and impose the penalty also prescribed therein.

"On a careful perusal of section 1 of 12 and 13 Victoria, chapter 96, it appears that the local Courts have jurisdiction and authority not only to inquire into and try offences committed on the high seas, but also to determine and adjudge them as if committed within the local jurisdiction of the said Courts If so, the whole of the procedure to be adopted should be Indian and not English, and the framing of the charge being only a matter of procedure, the charge in the present case ought, in my opinion, to define the offence as mentioned in section 408 of the Indian Penal Code. The proviso (section 2), it is true, imposes a different penalty, but that is *after the person's conviction*, and there is a long gap between the framing of the charge and the conviction, and I do not therefore understand how section 2 could re-act on section 1 and modify the express provision made therein for the trial and determination of such offences. This point has, no doubt, been decided in *The Queen* v. *Thompson*,[1] where it was held that the charge to be framed should be under the English law ; but the reasons given in that case appear to me to be inconsistent with the wording of section 1, and I have therefore some hesitation in adopting the view therein expressed. In *Reg.* v. *Elmstone*[2] this point has not been specifically dealt with, though it is true it is said there that the substantive law ought in such

(1) (1867) 1 B. L. Reng. 1 (Cr.)

(2) (1870) Bom. H. C. R. 89.

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cases to be English and not Indian; whilst in *Reg.* v. *Kastya Rama*[1] the offence was not committed on the high seas but within three miles of the shores of British India, and therefore the question about the nature of the charge to be framed did not arise. I beg, however, to draw the attention of their Lordships to the remarks made by West, J., in that case, which seem partially to support the view I have already expressed in this reference."

The reference was heard by a Division Bench (Candy and Fulton, JJ.)

*Scott* (Acting Advocate General) with *Messrs. Crawford and Co.* for complainant (the Bombay and Persian Steam Navigation Company), referred to Stat. 12 and 13 Vict. c. 96, section 1; 23 and 24 Vict. c. 88, section 1; 54 and 55 Vict. c. 67; 37 and 38 Vict. c. 27, section 3; Merchant Shipping Act of 1894, section 686; *Reg.* v. *Elmstone*[2] and *Reg* v. *Kastya Rama*.[3]

There was no appearance for the accused.

FULTON, J.:—The reply to the question put by the Third Presidency Magistrate is contained in section 3 of 37 and 38 Vict. c. 27.

His jurisdiction to try the offence is conferred by section 1 of 12 and 13 Vict. c. 96, declared applicable to India by section 1 of 23 and 24 Vict. c. 88, as well as by section 686 of the Merchant Shipping Act of 1894.

The question of procedure and punishment is determined by the first mentioned section of 37 and 38 Vict. c. 27. Section 2 of 12 and 13 Vict. c. 96 has been repealed by 54 and 55 Vict. c. 67.

Our answer is that the Presidency Magistrate, Bombay, has authority to convict a person for an offence under the Indian Penal Code, the said offence having been committed in a British ship during her voyage on the high seas. The charge should be framed in reference to the Indian Penal Code, and in case of conviction the punishment should be awarded under that Code.

*Answer accordingly.*

(1) (1871) 8 Bom. H. C. R. 63. (2) (1870) 7 Bom. H. C. R. 89.
(3) (1871) 8 Bom. H. C. R. 63.

## *FULL BENCH.*

## APPELLATE CIVIL.

*Before Sir L. Jenkins, Chief Justice, Mr. Justice Candy, Mr. Justice Fulton, Mr. Justice Crowe and Mr. Justice Chandavarkar.*

MALUKCHAND RATANCHAND AND ANOTHER (ORIGINAL DECREE-HOLDERS), APPLICANTS, *v.* BECHAR NATHA AND OTHERS (ORIGINAL JUDGMENT-DEBTORS), OPPONENTS.*

1901. *April* 15.

*Limitation Act (XV of 1877), schedule II, article 179 (4)—Execution—Payment of bhatta—No fresh starting point.*

An application for execution of a decree was made and granted on the 4th November, 1897. The *bhatta* (process-fee), however, was not paid to the Na'zir until afterwards, namely on the 8th November, 1897. There was no written application in connection with this payment, nor did it appear that there was any oral application at the time of the payment except such as might be inferred from the fact of payment.

*Held*, that such a payment of *bhatta* did not constitute a fresh starting point from which the period of limitation prescribed by article 179 of the Limitation Act (XV of 1877) began to run.

From the mere fact of payment of *bhatta* an application such as is prescribed by that article cannot be inferred: at most it would merely be an application to receive the money and the payment would be no more than the performance of a condition essential to the order for execution.

REFERENCE by Ráo Sáheb Mohanrai Dolatrai, Subordinate Judge of Borsad in the Ahmedabad District, under section 617 of the Civil Procedure Code (XIV of 1882).

The point raised by the reference was whether in execution proceedings the mere payment of *bhatta* (process-fee) was "an application for execution" within the meaning of article 179 of the Limitation Act (XV of 1877) so as to be the starting point for a new period of limitation as prescribed by that article.

The applicants applied for execution of a decree in November, 1900. There had been a previous application for execution made and granted on the 4th November, 1897, but the *bhatta* (process-fee) in respect of that application was not paid until the 8th

* Civil Reference No. 27 of 1900.

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MALUKCHAND v. BECHAR NATHA.

November, 1897. The question submitted to the High Court was whether the period of limitation prescribed by article 179 of schedule II of the Limitation Act, 1877, began to run from the latter date. If so, the present application was in time.

The reference by the Subordinate Judge was as follows:

The decree-holders apply to execute their father's decree by right of survivorship as against the defendants, alleging that their application is within time in consequence of the 'bhatta' having been paid in the previous proceedings on 8th November, 1897, Exhibit 5. The only question thus arising for determination is whether the payment of such *bhatta* is a step in aid of execution or not under article 179, clause 4, of the Limitation Act. Of course such a payment was till recently, under cover of the ruling at page 311 of Printed Judgments of 1884, considered such a step, but then the authority of that decision has been as it were doubted in the case of *Trimbak* v. *Kashinath Vidyadhar*, Printed Judgments of 1897, page 100, and hence the present reference, the point having not been expressly decided there. It has been urged that the law does not require any written application for the purpose, and there seems to be no reason why an oral application should not be presumed at the time of every such payment—the more so when it is remembered that a written application is required when the usual time is exceeded.

It is, however, sufficient to note that such payment after the presentation of a darkhást follows as a matter of ordinary routine only, and what is more, it being treated by circular No. 111 (*vide* High Court's Civil Circular Book, page 74) as an act more in the nature of a ministerial one than otherwise, it is obvious that the argument does not at all rigidly apply.

In these circumstances the correctness of the former practice, having regard to all the words of the clause under reference as noticed in the decision of 1897 aforesaid, seems open to serious question, and with this humble expression of opinion on the point, therefore, I would respectfully submit this case for the orders of the Honourable the High Court.

The case was heard by Jenkins, C. J., and Chandavarkar, J., who referred it to the Full Bench with the following judgment:—

JENKINS, C. J.:—The question referred to us for our opinion is, whether the payment of *bhatta* on the 8th November, 1897, saves an application for execution presented within three years of that date from the bar of limitation.

In *Bhoma* v. *Kamaji*[1] the question referred for decision of the High Court was "whether an application for execution of a money decree made within three years of the date of payment of *bhatta* for a sale warrant is within time." To this Sargent, C. J., and

(1) (1884) P. J. p. 311.

Kemball, J. answered as follows:- "The Court concurs with the predecessors of the Subordinate Judge in thinking that the payment of *bhatta* for the sale warrant is a 'step in aid' of execution."

In *Dwarkanath* v. *Anandrao*[1] a somewhat similar point arose. On the 17th of July, 1890, the plaintiff in that suit applied for execution. Notice was issued under section 248 of the Civil Procedure Code on the 18th July, 1890, and a process-fee of eight annas was levied. The proper fee was Rs. 2, and the deficit court-fee was made good by a payment into Court on the 29th August, 1890. The notice, however, had already been issued and served. On the 22nd August, 1893, a fresh *darkhást* for execution was presented, but the Court held that it was barred, though it was within three years of the 29th August, 1890.

The learned Judges in the course of their judgment said:

> The case of *Bhoma* v. *Kamaji* is relied on; but there is nothing in that case to show that the payment was made after the application to the Court and the step taken by it. On the present facts it does not appear that any application for execution or to take a step in aid of execution was made when the additional court-fee was paid. The words of clause 4 therefore do not save the limitation.

Then in *Trimbak* v. *Kashinath*[2] it was said:

> Whether the payment of *bhatta* is a sufficient proof of an application to the Court to take the step in respect of which the *bhatta* is paid is doubtful according to the reported cases. The mere payment of a process-fee under circumstances from which no application can be inferred does not of course satisfy the requirements of article 179 (4).
>
> In *Bhoma* v. *Kamaji* the Court appears to have presumed an application from the payment of the process-fee.

An examination of *Bhoma's* case discloses no reference to such a presumption and the form of the answer appears to point to an opinion that the payment of the *bhatta* was *per se* sufficient to constitute a new starting point. The two later decisions throw a doubt on the opinion expressed in *Bhoma's* case, and we therefore refer for the decision of the Full Bench the question,— "Whether the payment of *bhatta* in execution proceedings is under any, and if so what, circumstances sufficient by itself, or by virtue of any inference arising therefrom to constitute the time from which the period of limitation begins to run under article

(1) (1894) 20 Bom. 179. (2) (1897) 22 Bom. 722.

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179 (4) in the second schedule to the Indian Limitation Act, 1877."

The case being thus referred, it was heard by a Full Bench consisting of Jenkins, C.J., Candy, Fulton, Crowe and Chandavarkar, JJ.

*Manubhai Nanabhai* (*amicus curiæ*) for the applicants (decree-holders):—The question is whether our present application which was made on the 7th November, 1900, is in time. The previous application was made on the 4th November, 1897, and the *bhatta* was paid on the 8th November, 1897. Our present application is in time if the period of limitation be computed from the day on which the *bhatta* was paid: article 179 of schedule II of the Limitation Act. We contend that the payment of the *bhatta* on the 8th November was itself an application for execution and a step in aid of execution. There is no provision of law which requires that such an application should be made in writing. Therefore it was open for us to make the application in any way we liked. The payment of the *bhatta* in Court having been accepted and a process having been thereupon issued, an application must necessarily be inferred. These circumstances themselves constituted an application on which the Court took action. The fact of the payment of the *bhatta* must be taken in connection with the darkhást for execution in respect of which it was made. *Bhatta* is not a mere payment of money, but it is a payment for issuing the process. If we had merely put the money on the table of the officer of the Court without saying anything, the officer of the Court would not know the object for which the money was paid. But when we paid the money and said that it was *bhatta*, it was at once understood that it was a payment for the issue of process. In the payment of the *bhatta* an application was implied. It has been held that payment of *bhatta* is a step in aid of execution—*Bhoma* v. *Kamaji*.[1] If the payment of *bhatta* is a step in aid of execution, then the fact of the payment was itself an application independently of the circumstance that process was issued. The Subordinate Judge erroneously supposed that the ruling in *Bhoma* v. *Kamaji*[2] was dissented from in *Trimbak* v. *Kashinath*.[3] *Dwarkanath* v. *Anandrao*[4] supports our contention.

(1) P. J. 1884, p. 311.
(2) P. J. 1884, p. 311.
(3) (1897) 22 Bom. 722.
(4) (1894) 20 Bom. 179.

*Markand N. Mehta* (*amicus curiæ*) for the opponents (auction-purchasers). He cited the following rulings:—*Toree Mahomed* v. *Mahomed Mahood Bux*[1]; *Rajkumar Banerji* v. *Kajlakhi Dabi*[2]; *Umesh Chunder Dutta* v. *Soonder Narain Deo*[3]; *Ananda Mohan Roy* v. *Hara Sundari*[4]; *Raghunundun Misser* v. *Kallydut Misser*[5]; *Keshavlal Bechar* v. *Pitamberdas*[6]; *Dwarkanath* v. *Anandrao*[7]; *Bhagwan* v. *Dhondi*.[8]

JENKINS, C.J.:—The question whether payment of *bhatta* calls into play article 179 (4) in the second schedule to the Indian Limitation Act, 1877, is one on which conflicting views are held, and in view of this conflict, it is necessary to see what the Act, apart from the authorities, says.

So much of the article as governs this case requires (1) that there should be an application in accordance with law to the proper Court, and (2) that the purpose of the application should be for the Court to take some step in aid of execution. Here an application for execution was made and granted: until payment of *bhatta*, however, process according to the ordinary practice would not issue, so that this payment is in effect a condition of that issue. *Bhatta* was paid to the Názir on the 8th of November, 1897, and it is this payment that gives rise to the question in this case.

There admittedly was no written application in connection with this payment, but it is said that an oral application would answer the requirements of the article.

There is, however, no trace of any oral application except such as may be inferred from the fact of payment. But from a mere payment to the Názir I cannot infer such an application as the article prescribes: at most it would merely be an application to receive the money and the payment would be no more than the performance of a condition essential to the order for execution. The application leading up to the order for execution of course comes within the 179th article, but to hold that the payment of

(1) (1883) 9 Cal. 730.
(2) (1885) 12 Cal. 441.
(3) (1889) 16 Cal. 747.
(4) (1895) 23 Cal. 196.
(5) (1896) 23 Cal. 690.
(6) (1894) 19 Bom. 261.
(7) (1894) 20 Bom. 179.
(8) (1896) 22 Bom. 83.

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*bhatta* has a similar operation for the purpose of limitation is to my mind merely to place a premium on dilatoriness.

Therefore I would answer the question referred by saying that the payment of *bhatta* in this case did not constitute a fresh starting point from which the period of limitation began to run.

CANDY, FULTON, CROWE and CHANDAVARKAR, JJ., concurred.

*Answer accordingly.*

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## *FULL BENCH.*

## APPELLATE CIVIL.

*Before Sir L. Jenkins, Chief Justice, Mr. Justice Candy, Mr. Justice Crowe and Mr. Justice Chandavarkar.*

1901. *April* 15.

DHANJIBHOY BOMANJI (ORIGINAL DEFENDANT), APPELLANT, *v.* HIRABAI (ORIGINAL PLAINTIFF), RESPONDENT.*

*Husband and wife—Parsis—Suit for restitution of conjugal rights—Limitation—Limitation Act (XV of 1877), section 23, schedule II, article 35—Parsi Marriage and Divorce Act (XV of 1865).*

A suit under the Parsi Marriage and Divorce Act (XV of 1865) by a wife for the restitution of her conjugal rights is barred by the lapse of time when restitution has been demanded by her and refused by the husband being of full age and sound mind more than two years prior to the commencement of the suit.

REFERENCE to a Full Bench by a Division Bench (Jenkins, C.J., and Chandavarkar, J.).

The plaintiff Hirabai sued the defendant, her husband, for restitution of conjugal rights.

She alleged that in August, 1883, the defendant had assaulted her and turned her out of his house.

On the 29th June, 1895, the plaintiff through her attorneys gave notice to the defendant requiring him to resume cohabitation with her. On the 11th July, 1898, the defendant replied refusing her request.

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On the 23rd September, 1899, the plaintiff filed this suit for restitution of conjugal rights.

On the 3rd August this case was heard by Fulton, J., and the Parsi delegates. It appeared in the evidence given in the course of the case that there had been an earlier demand (*viz.* in 1886 or 1887) by the plaintiff for restitution of conjugal rights and a refusal by the defendant. The point of limitation was then raised. It was contended for the defendant that the suit ought to have been brought within two years after the first demand and refusal and that the later demand and refusal did not give a fresh cause of action. The objection was overruled and the case proceeded.

On the verdict of the delegates, which was in favour of the plaintiff, the Judge passed a decree granting her restitution of conjugal rights.

The plaintiff appealed. The appeal came on for hearing before Jenkins, C.J., and Chandavarkar, J., who referred the following question to a Full Bench :—

"Whether, having regard to section 23 of the Indian Limitation Act (XV of 1877) and article 35 in the second schedule to that Act, a suit under the Parsi Marriage and Divorce Act XV of 1865 by a wife for the restitution of her conjugal rights is barred by lapse of time when restitution has been demanded by her and refused by the husband being of full age and sound mind more than two years prior to the commencement of the suit."

Section 23 of the Indian Limitation Act (XV of 1877) is as follows :

23. In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.

Article 35 of schedule II to the Limitation Act (XV of 1877) provides that "for a suit for the restitution of conjugal rights the period of limitation shall be two years from the time when restitution is demanded and is refused by the husband or wife being of full age and sound mind."

The question referred by the Division Court was argued before a Full Bench consisting of Jenkins, C.J., Candy, Crowe and Chandavarkar, JJ.

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*Inverarity* (*Scott*, Acting Advocate General, and *Lowndes* with him) for the appellant :—

We contend that under the Limitation Act (XV of 1877) demand and refusal create a complete cause of action and only one suit can be brought in respect of it, and that suit must be brought within two years under article 35 of the Limitation Act. The cause of action arises upon refusal. The refusal is a refusal once for all. It cannot have been intended that a fresh demand followed by a fresh refusal would again create a cause of action for precisely the same matter. That would be to make the provision for limitation a nullity. It is evident, therefore, that section 23 of the Limitation Act cannot apply.

This suit is brought under section 36 of the Parsi Marriage and Divorce Act (XV of 1865). That section is similar in terms to the Indian Divorce Act (IV of 1869) section 32. By section 1 of the Limitation Act (XV of 1877) it is provided that Part II of that Act (which contains section 23) shall not apply to suits under the Indian Divorce Act (IV of 1869).

The case of *Hemchand* v. *Siva*[1] was decided under the Limitation Act (XIV of 1859) which did not contain any special provision for such suits. The case of *Bai Sari* v. *Sankla Hirachand*[2] merely followed that case, although the Limitation Act of 1877 was then in force. That decision is wrong. The latest case on the point is *Fakirgauda* v. *Gangi*,[3] and it throws doubt on the previous decisions. They also cited *Ardesar* v. *Avabai*,[4] and Browne on Divorce, page 124.

*Robertson* for the respondent :—

We contend that section 23 of the Limitation Act (XV of 1877) applies. The cases already cited are in our favour. Husband and wife have a continuing right to each other's society. That right lasts as long as the relationship lasts. The lapse of two years after a demand and refusal does not sever the relationship and does not destroy the right. The right still remains and becomes enforceable by suit whenever a demand is followed by a

(1) (1883) 16 Bom. at p. 715 *note*.
(2) (1892) 16 Bom. 714.
(3) (1898) 23 Bom. 307.
(4) (1872) 7 Bom. H. C. R. 290.

refusal. *Binda* v. *Kaunsilia*[1] supports our contention. They also cited Maxwell on Statutes, pages 112, 264 and 277.

JENKINS, C.J.:—The question referred for the opinion of this Full Bench is, "Whether, having regard to section 23 of the Indian Limitation Act, 1877, and article 35 in the second schedule to that Act, a suit under the Parsi Marriage and Divorce Act (XV of 1865) by a wife for the restitution of her conjugal rights is barred by lapse of time, when restitution has been demanded by her, and refused by her husband, being of full age and sound mind, more than two years prior to the commencement of the suit."

It has been held that in the case of neither Hindus, nor Parsis, is the suit barred, and an opinion has been expressed that the law would be the same in the case of Mahomedans. At the same time the Act itself particularly excludes from its operation all Christian marriages (see section 1). If these decisions are right, it is difficult to see what the purpose of article 35 is in a Limitation Act.

One of the earliest reported decisions on this article is *Binda* v. *Kaunsilia*.[2] It was there held that article 35 did not govern a suit brought by a Hindu husband for restitution of conjugal rights. The *ratio decidendi* appears to be that article 35 can only apply to suits where demand and refusal are necessary, and, as this is not a necessary condition of a suit by a Hindu husband or wife, the article has no application to such a suit. It was further held that article 120, read with section 23, provided the period of limitation; in other words, that such a suit never was barred. This decision has been cited with approval in *Bai Sari* v. *Saukla Hirachand*.[3]

In my opinion, however, there is a fallacy underlying this train of reasoning. It proceeds on the assumption that the 3rd column of the 35th article describes the conditions on which alone the particular suit can be brought. But this is not so: it merely describes the event, from which the period of limitation runs, without in any way providing or declaring that the

(1) (1890) 13 All. 126 (2) (1890) 13 All. 126.
(3) (1892) 16 Bom. 714.

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happening of that event is an essential condition to the competence of the suit. *Bai Sari* v. *Sankla Hirachand*[1] was decided by Jardine, J. and Telang, J., but beyond the expression of a general concurrence in the decree the only judgment is that delivered by Jardine, J. That learned Judge, though citing *Binda's case* as supporting his view, really based his decision on *Hemchand* v. *Shiv*, reported in the note, which he considered "applicable to the Limitation Act of 1877 in the absence of any words in articles 34 and 35 of the second schedule removing those articles from the operation of section 23." But the judgment in *Hemchand* v. *Shiv* was under Act XIV of 1859, which contained no article specially dealing with suits for the restitution of conjugal rights, a circumstance obviously most material in estimating the applicability of that decision. There is, however, one point on which the judgment in *Hemchand* v. *Shiv* has a direct bearing, and that is the determination that the refusal of the wife to return and allow the husband the exercise of his conjugal rights, and the retention of the wife constituted "continuing wrongs giving rise to constantly recurring causes of action on demand and refusal." But the opinion that there were constantly recurring causes of action on *demand and refusal*, is opposed to that which is the basis of *Binda's case*, so that Jardine, J.'s treatment of the authorities cannot be regarded as critical. In my opinion article 35, standing alone, would impose no bar in the absence of demand and refusal, but if demand and refusal (though unnecessary for the purposes of the suit) be made, the position for the purpose of limitation is crystallized and time begins to run.

In my opinion the words of article 35, read by themselves, do impose on the special remedy of restitution of conjugal rights a time-bar, when there has been a demand and refusal, though that may not be a necessary part of the cause of action. But in disparagement of this as a complete view, it is said that such a result leaves out of account section 23 of the Act. The husband's conduct, it is argued, is a continuing cause of action, whether it be regarded as a breach of contract or a wrong

(1) (1892) 16 Bom. 714.

independent of contract. For the sake of argument I will assume this to be so; still it has to be seen how far this will affect the bar imposed by article 35.

In the first place it must be borne in mind that section 23 is general in its terms: the 35th article, on the other hand, is particular and deals with a special form of remedy under defined conditions. If there be a repugnancy, the particular provision should prevail, but I see nothing repugnant in the imposition of a bar on a suit for a particular remedy, even though the cause of action be continuing. The Act itself furnishes apt illustrations of this: thus a suit to restrain waste is barred after two years from the time when the waste *begins* (article 41). Then again a suit for wrongfully detaining specific moveable property becomes barred under article 49: and, to come near to the point now under consideration, a suit for the recovery of a wife is barred two years after possession is demanded and refused (article 34), though her retention would seem to be as much a continuing wrong to the husband as the withholding by the wife herself of the rights which belong to him as incidental to the married state.

It has been suggested that the words of the section would be satisfied by holding that no suit could be brought except within two years after *some* demand and refusal: it seems to me, however, that a Limitation Act is hardly the place for such a provision. The result then is that I would answer the question referred to us in the affirmative.

CANDY, J.:—As I was a party to the judgment in *Fakirgauda* v. *Gangi*,[1] which expressed the doubt and difficulty involved in the question now referred to a Full Bench, I will indicate briefly the reasons which have led me to the conclusion that the answer in the affirmative proposed by the learned Chief Justice is the least unsatisfactory solution of the difficulty.

The effect of the decision of the Punjab Full Bench in 1879 was that, quite independently of section 23 of Act IX of 1871 or of Act XV of 1877, there was practically no limitation to suits for restitution of conjugal rights or for possession of a wife from a third party, because the law allows repeated demands, and if a

(1) (1898) 23 Bom. 307.

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suit is barred because brought more than two years after a demand and refusal, there is nothing to prevent a plaintiff making a fresh demand, and on meeting with a refusal bringing a fresh suit. When the case was in the Division Court at Lahore Mr. Justice Elsmie had been of a contrary opinion. He then held that the only reasonable interpretation which could be placed on articles 41, 42 of schedule II of Act IX of 1871 (answering to articles 34, 35 of schedule II of Act XV of 1877) was that the Legislature considered that if a husband has treated his wife's refusal to live with him with indifference for a period of two years she should not be compelled to return to his custody against her will, and possibly it would not be difficult to give reasons in support of the wisdom of such an enactment. Unless some such explanation of articles 41, 42 was accepted, their presence in the Act would seem to be for all practical purposes inoperative, a result which could hardly have been contemplated by the Legislature. In the Full Bench he did not adhere to this view, and he came to the conclusion that the articles were for all practical purposes inoperative.

Then came the decision in *Hamchand* v. *Shiv*.[1] In that case the husband in 1873 sued his wife, and a person who was harbouring her, for restitution of conjugal rights and for possession of his wife. The first Court found that the husband had disappeared for several years, but that he returned home in 1872, and filed the suit within the prescribed period (six years under section 1 (16) of Act XIV of 1859) from the attempt made by him to recover his wife. There was apparently only one such attempt.

On appeal the Assistant Judge held that the view taken by the Subordinate Judge was based on the Limitation Act of 1871, but in Act XIV of 1859 there was no provision as to the time from which the cause of action should date. He held that the cause of action arose when the wife went through "natra" ceremony with the second defendant with whom she was living; and as plaintiff had not brought his suit within six years from that date the bar of limitation arose.

(1) P. J. for 1883, 124; see 16 Bom. 715 note.

But on second appeal Sargent, C.J., and Kemball, J. (adopting terminology to be found in Acts IX of 1871 and XV of 1877, but not in Act XIV of 1859,) held that the refusal of the plaintiff's wife to return to him and to allow him the exercise of his conjugal rights, and the retention of the plaintiff's wife by the second defendant with whom she was living, constituted continuing wrongs, giving rise to constantly recurring causes of action on demand and refusal, and therefore the plaintiff's action, whether as against his wife or the second defendant, was not barred.

As noticed above, the only demand and refusal in the case was in 1872. The suit was filed in 1873. But the language used by the learned Judges seems to show that in their opinion for a cause of action to arise in such a suit there must be a demand and refusal, and that there may be repeated demands followed by refusal, each one giving rise to a fresh cause of action, the period of limitation under Act XIV of 1859 being six years from the time the last demand and refusal occurred. This is the position which was attacked by Mr. Justice Mahmood in 1890 in *Binda* v. *Kaunsilia*.[1] He held that demand and refusal were not a condition precedent to the maintainability of such a suit by a Hindu husband, and that they had not been made so by articles 34, 35 of schedule II of Act XV of 1877, the effect of these two articles being merely a general indication that the Legislature intended two years to be the period of limitation for such suits, to be calculated from the starting point described in the third column, *where such description applies*, but in other cases the matter would be governed by the ordinary rules of applying limitation, calculating it from the time when the right to sue accrued. With reference to section 23 of the Limitation Act, Mr. Justice Mahmood agreed with the Panjab and Bombay rulings; but he hesitated to determine how far he was prepared to accept those rulings in so far as they may be understood to lay down that successive demands and refusals are either required or could be made as foundations of successive actions for restitution of conjugal rights, with the result that there would be no limitation or any other plea *in limine* barring such

(1) (1890) 13 All. 126.

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suits so long as they were brought within two years from some demand and refusal. He, however, observed that much doubt and difficulty have arisen in consequence of not realizing clearly the distinction between a demand which by the substantive law forms an essential element of the cause of action, that is the gist of the action, and, as such, a condition precedent to the enforcement of the right by suit, and demands which do not constitute the gist of the action and which therefore the law does not render indispensable. The practical effect of Mr. Justice Mahmood's decision was to hold that articles 34, 35 must be read as inapplicable to suits by Hindu husbands and therefore virtually superfluous, and to apply the general article 120, and reading it with section 23 to hold that limitation does not bar the suit, either against the wife or against the other person who is harbouring her, although the demand and refusal of conjugal rights were superfluously made about five years before the suit. He considered it unnecessary that the plaintiff should be required to accept the dismissal of his suit, and to make a fresh demand the basis of another suit against the same parties and for the same relief, or to decide whether such a second suit would be maintainable.

The next case is *Bai Sari* v. *Sankla Hirachand*[1] in which plaintiff sued his wife for restitution of conjugal rights. The wife had left her husband's house in 1884. About six months afterwards the husband went to his father-in-law's house to fetch his wife, but she declined to return to his house. In 1888 the suit was filed. On the day before the institution of the suit the husband attempted by force to take his wife to his house, but the police intervened, and she returned to her father's house. Both the lower Courts held that as the last demand and refusal took place only a day before the institution of the suit it was not barred by limitation.

Mr. Justice Jardine upheld this view, being of opinion that the decision in *Hemchand* v. *Shiv* (noted above), being based on general consideration of the rights arising under the bond of marriage and not on the phraseology of Act XIV of 1859, is applicable to the Limitation Act of 1877, in the absence of

(1) (1892) 16 Bom. 714.

any words in articles 34 and 35 of the second schedule removing those articles from the operation of section 23. He added: "I am supported in this opinion by the reasons given in *Binda* v. *Kaunsilia*, interpreting the Act of 1877." But the ruling in *Binda* v. *Kaunsilia* was that articles 34 and 35 were inapplicable and superfluous.

Lastly, there is the case of *Fakirgauda* v. *Gangi*[1] decided by the late Sir Charles Farran, C.J., and myself in 1898. That was in substance a suit for restitution of conjugal rights, to which we held article 35 to be appropriate. But we held that the demand and refusal deposed to on behalf of the defendant must be eliminated from consideration for the purposes of limitation, because the wife was not then of full age. Assuming that the Limitation Act recognizes the necessity of a husband asking his wife to join him or to return to his house before he can file a suit to compel her to do so, there was evidence, which apparently the District Judge did not disbelieve, that there had been a demand and refusal about a year before suit. Thus there was a cause of action and no bar of limitation. But we did not wish to express an opinion as to whether, if the prior demand and refusal had been valid for the purposes of limitation, the present suit by the plaintiff would have been absolutely barred, nor as to whether section 23 of the Limitation Act applies to such a case. "The question, apart from the authorities, appears to us to be one of doubt and difficulty."

The question now referred to the Full Bench compels me to form a definite opinion on the subject, which I still think is of great difficulty. In the first place I think that the withdrawal without reasonable excuse either by husband or wife from the society of the other is a continuing wrong. The wrongful act complained of creates a continuing source of injury. Every moment of time during which the husband or wife remains withdrawn from the society of the other without reasonable excuse, the wrong continues. Section 23 is therefore applicable, and thus a fresh period of limitation begins to run at every moment of the time during which the wrong continues. But, in the next place, the cause of action is the one being withdrawn

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from the society of the other without reasonable excuse. The cause of action is not created by a demand that that withdrawal should cease, and a refusal to comply with that demand. The obligation exists apart from any demand. Further, I agree with Mr. Justice Mahmood that the words in the third column of article 35 cannot be read or interpreted as if the Statute enacted that no suit for the restitution of conjugal rights shall be maintained unless restitution is previously demanded and refused. I cannot add to the arguments set forth at pages 140 to 146 of 13 Allahabad Indian Law Reports.

How, then, are we to reconcile article 35 with section 23 without making the former superfluous or practically inoperative? The only possible way is by holding that when restitution is demanded and is refused by the husband or wife, then the law provides that the suit for restitution must be brought within two years from that time. If the parties are really at arm's length, then the law provides that a settlement of those differences, if desired by either of them in a Court of law, must be sought for within a reasonable time. A husband and wife may live apart without reasonable excuse for a dozen years, and neither may take the trouble to put an end to this state of things. Suppose that after this lapse of time the husband forthwith sues his wife for restitution of conjugal rights or *vice versa*, a plea that she or he would have been willing to return or have her back, had any demand been made, would be no answer to the suit, though it might be a matter for consideration as regards costs. So far section 23 would be given full effect. But if there had been demand and refusal, then the remedy for the wrong which is still continuing must be sought for within two years. This is the solution, which is not entirely satisfactory, but which presents the least difficulty.

No doubt it would be more satisfactory if we could (to apply the language used by Sir J. F. Stephen in 1871) settle the point by considering what arrangement would be most expedient for the public, instead of attempting to determine what an ill drawn law would have meant if it had any particular meaning bearing upon the point. But unfortunately our Courts have to apply the law as it is, not as it ought to or might have been,

and to see what the law is, we must endeavour to find out what the Legislature intended.

The principle of a *continuing* breach of contract or nuisance was first embodied in a Limitation Act by Act IX of 1871. The illustration of a continuing nuisance was the diversion by A of B's water-course. By section 23 a fresh period of limitation began to run at every moment of the time during which the diversion continued. And yet by article 32 of the second schedule of Act IX of 1871 the period of limitation in the case of a suit for diverting a water-course was two years from the date of the diversion. Possibly it was to remedy this anomaly that the Legislature in Act XV of 1877 altered the wording of article 38 to "compensation for diverting a water-course." But, as has been pointed out, there are similar anomalies in regard to other articles in Act XV of 1877. Until the Legislature has declared its mind clearly we must interpret the Act in the way which has the least difficulty. I would answer the question in the affirmative.

CROWE, J.:—I concur for the reasons given by the learned Chief Justice.

CHANDAVARKAR, J.:—I concur both in the conclusion and the reasons of the judgment just delivered by the learned Chief Justice. I think it right to add a word or two as to certain observations of the learned Judges of the Allahabad High Court who decided the case of *Binda* v. *Kaunsilia*,[1] on which Mr. Robertson relied to some extent in support of his contention that a suit for the restitution of conjugal rights is never barred by limitation and gives rise to continuing causes of action on demand and refusal. In the case just cited it was said that the practical effect of holding such a suit barred under article 35 of the Limitation Act would be to dissolve the marriage tie and "involve the conclusion that the Legislature by a side-wind effectually introduced divorce into the Hindu law." I confess I fail to perceive the force of that reasoning, for, in the first place, if that is a correct view of the law, it should logically

(1) (1890) 13 All. 123.

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follow that whenever a Court declines to grant restitution upon some ground, whether of limitation or otherwise, it pronounces by a side-wind a divorce between the parties. But such is not the necessary effect of the dismissal of a suit for the restitution of conjugal rights. For instance, it has been held by all the High Courts in India that where a Hindu husband claims the restitution of conjugal rights from his wife, the Courts are bound to dismiss his suit if legal cruelty and desertion on his part are proved. The effect of such refusal has never been held to be to give the wife a divorce, and yet it ought to have that effect according to the reasoning of the decision just cited of the Allahabad High Court. Where, again, an unchaste wife claims restitution against her husband, I take it that her unchastity would be held to be a good ground for refusing it. But even in such a case the Hindu law allows no divorce—the justifiable abandonment of the wife by her husband under such circumstances does not give her, according to Hindu law, any right to regard the marriage tie as dissolved and marry again. So also it has been held by this Court in *Bai Premkuvar* v. *Bhika Kallianji*[1] that a suit by a Hindu husband suffering from loathsome disease such as leprosy against his wife for the restitution of conjugal rights cannot lie. But because the husband in such a case has his suit dismissed, it does not follow that the wife ceases to be his wife and that all the consequences of a divorce follow from the dismissal of the suit. As remarked by the learned Judges who decided the case of *The Government of Bombay* v. *Ganga*,[2] the mere fact that a party cannot claim domestic and marital rights does not operate as a divorce. This was also the view taken by the Madras High Court in *Administrator General of Madras* v. *Anandachari*,[3] where it was held that a wife's refusal to cohabit with her husband and renounce all material claims upon him does not dissolve the marriage tie. According to the Hindu law, desertion, or natural death, or civil death cannot have the effect of a divorce, the only exception to that rule being degradation of caste or apostacy and even then the rule is that refusal on the part of one of the married couple to associate with his or her

(1) (1868) 5 Bom. H. C. 200. (2) (1880) 4 Bom. 330.
(3) (1886) 9 Mad. 466, at p. 470.

married spouse amounts to a divorce only where "the surviving consort can be allowed to marry." (See Shama Charn Sirkar's Vyavastha Chandrika, pages 490, 491.)

The fallacy of the reasoning of the judgment of the Allahabad High Court on this particular point appears to me to lie in supposing that a statute of limitations destroys the marital rights in such a case, whereas all that it does is to bar the remedy if that remedy is not pursued within the period fixed by the Statute. And the remedy that is so barred is in respect of only *one* of the marital rights—that is, the right which one of a married couple has to enforce on the other what their Lordships of the Privy Council term in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum*(1) "the broad duty of cohabitation," such duty forming the gist of an action for the restitution of conjugal rights. A law of limitation is, generally speaking, concerned with the *active* prosecution of rights but does not lay down that in all cases if the rights are not *actively* enforced within a specified time the rights shall be extinguished. The Indian Limitation Act by section 28 specifies the cases as to which only failure to prosecute a right within the time specified by it destroys the right: but a suit for the restitution of conjugal rights is not one of them. The effect, therefore, of holding that upon the true construction of article 35 of the Limitation Act, a suit for the restitution of conjugal rights is barred if it is not brought within two years from the date when restitution is demanded and is refused by the husband or wife, being of full age and sound mind, is, I think, not to dissolve the marriage tie and pronounce a divorce, but merely to bar the remedy for restitution. The wife would still continue to be the wife of the husband and *vice versâ*, and to have other rights and be subject to other obligations incidental to the marital relation. In the judgment of the Allahabad High Court with which I am now dealing, it is rightly pointed out that it being clear upon the authority of the Hindu law that the sovereign has authority to afford to an aggrieved husband or wife relief by way of restitution of conjugal rights, our Courts have jurisdiction to give that relief, but the

(1) (1867) 8 W. R, 3 at p. 13.

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manner in which the Courts are to protect the right to that relief or enforce it "is to be regulated by the condition of the times." It is perfectly consistent with that view to hold that the Legislature has determined the procedure according to which, while fully recognizing the right of a husband or wife to the restitution of conjugal rights, the law says that the right shall be pursued within a specified period or else the remedy will be barred.

Some argument was addressed to us by Mr. Robertson, based on the ground that if the Legislature had intended that a husband or wife should lose his or her right to restitution if that right were not enforced within a prescribed period, it would have fixed a longer period than two years. But this short period of two years prescribed by the Legislature is, it seems to me, in consonance with the policy and scheme of the Limitation Act, which is to prescribe short periods for all claims involving the settlement of disputes as to such delicate and intricate questions as those of marriage and adoption, on the ground that, as these questions have in this country to be determined mostly by oral evidence, which is often of a conflicting character, aggrieved parties should not be allowed to lie idle for a long time and to come into Court after the best available evidence has disappeared. See the remarks of the Privy Council in *Jagadamba* v. *Dakhina Mohun*.[1]

Attorneys for the plaintiff—*Messrs. Sorabji and Jehangir.*

Attorneys for the defendant—*Messrs. Jehangir and Seervai.*

(1) (1886) 13 I. A. 84; 13 Cal. 308.

# ORIGINAL CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Starling.*

N. C. MACLEOD, OFFICIAL ASSIGNEE (ORIGINAL DEFENDANT 1), APPELLANT, *v.* KIKABHOY KHUSHAL (ORIGINAL PLAINTIFF), RESPONDENT.*

1901. *June* 14, 21.

*Insolvency—Property subject to mortgage in possession of insolvent at date of insolvency—Indian Insolvency Act (Statute 11 and 12 Vict. c. 21), section 23—Reputed ownership—Fixtures—Goods and chattels—Registration of mortgage—Registration Act (III of 1877), section 17.*

On the 23rd June, 1893, one Vishram Meghji, the owner of a flour mill, mortgaged all the machinery, engines, plant, stock, implements, utensils, trade fixtures, chattels and effects specified in schedule annexed to the deed of mortgage to the plaintiff for Rs. 8,000 then advanced, and power was given to the plaintiff to sell the same in default of payment. In March, 1899, Vishram Meghji became insolvent, and his estate thereupon vested in the Official Assignee. The plaintiff claimed the mortgaged property, but the Official Assignee contended that under section 23 of the Indian Insolvency Act (Stat. 11 and 12 Vict. c. 21) he was entitled to it as property which with the consent of the true owner was in the possession, order or disposition of the insolvent at the date of insolvency. The property was sold by consent and the plaintiff brought this suit to recover the proceeds. From the evidence it appeared that the greater portion of the mortgaged property consisted of articles fixed to various parts of the flour mill or of the machinery therein.

*Held*, as to the articles not so fixed that the plaintiff was not the true owner of these and that they were not therefore within the section and passed to the Official Assignee.

2. As to the fixed articles that they were not goods and chattels in the possession, order or disposition of the insolvent as the reputed owner and that they were not in his reputed ownership within the section. The plaintiff was therefore entitled to them or to such portion of the proceeds of sale as represented their value.

It was contended that the fixed articles must either be goods and chattels or immoveable property, and if the latter, they could not be affected by the mortgage deed as it was not registered and the charge in favour of the plaintiff was therefore invalid.

*Held*, that the question of registration depended on the Registration Act (III of 1877), which requires the registration of all assurances of immoveable property. The fixed articles in question did not fall within the definition of immoveable property contained in section 3 of that Act, not being "attached to the earth or

* Suit 395 of 1899; Appeal 1114.

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permanently fastened to any thing which is attached to the earth." Section 17 of the Registration Act therefore did not apply.

Fixtures are not goods and chattels within the rules of reputed ownership laid down in section 23 of the Indian Insolvency Act (Stat. 11 and 12 Vict. c. 21). The fact of such fixtures being removeable by a tenant makes no difference. They are still fixtures to which the doctrine does not apply.

THE plaintiff Kikabhoy Khushal sued the Official Assignee (defendant 1) as the assignee of the estate of Vishram Meghji, an insolvent (defendant 2), to recover the sum of Rs. 8,000 and interest out of the proceeds of certain property which had been mortgaged to the plaintiff on the 23rd June, 1893, but which upon the insolvency of Vishram Meghji (defendant 2) in March, 1899, had been taken possession of by the Official Assignee (defendant 1) and sold.

Vishram Meghji was the owner of a flour mill, and by an indenture dated the 23rd June, 1893, for an advance of Rs. 8,000 made to him by the plaintiff, he charged "all the machinery, engines, plant, stock, implements, utensils, trade fixtures, chattels and effects now standing or being in or upon or belonging to or used in connection with the said flour mill more particularly specified in the schedule A hereto" as security to the plaintiff for the repayment of the said sum of Rs. 8,000. He further covenanted that he would not remove any of the said chattels or premises without the plaintiff's consent, and by the said deed the plaintiff was given power to sell the mortgaged property.

The schedule referred to in the deed was as follows:

*List of machinery and other goods in the flour mill.*

One boiler twenty feet by six in diameter by Daniel Adamson.
One double cylinder engine twenty-four horse-power.
One donkey engine, three cast-iron mill frames, each four feet complete with wheel and other accessories.
Three pairs mill-stones, four feet, by Mabel and Company.
One chimney forty feet long two feet in diameter.
Shaftings forty feet long and three inches thick with pulleys complete.
One shafting of the mill fifteen by four.
One large pulley six feet long.
Three tubs for the mill.
Six tanks for water.
One tank for oil eureka.
One wheat-cleaning machine.

One screw-cutting lathe sixteen feet long complete.
One hoist with chain complete.
Three centrifugal or shifting machines.
Three cranes for raising stones.
Two blowers.
One box new drilling tools.

In January, 1899, there was a sum of Rs. 7,158 due to the plaintiff on the security of the said mortgage, and the plaintiff called upon Vishram Meghji to pay it within twenty-four hours. The money was not paid.

In March, 1899, Vishram Meghji became insolvent and his estate vested in the Official Assignee (defendant 1). The plaintiff claimed the mortgaged property, but the Official Assignee repudiated his claim, alleging that he (the Official Assignee) was entitled to the property under section 23 of the Indian Insolvency Act (Stat. 11 and 12 Vict. c. 21)[1] as property which, with the consent of the true owner, was in the possession, order and disposition of the insolvent at the time of his insolvency.

The property was subsequently sold as above stated by the Official Assignee for Rs. 8,000 with the plaintiff's consent and without prejudice to his claim, and the plaintiff now claimed the proceeds.

With respect to the articles mentioned in the above list the following evidence was given at the hearing:

The following were fixed to a foundation :—the boilers, the cylinder, the donkey engine, three mill-stones, the chimney.

Six shaftings were fixed to a beam, one shafting was fixed to the engine of the grinding mill.

The large pulley was fixed to the engine.

The other tools were part of the grinding machinery.

They were not fixed—they could be removed whenever required. Six tanks for water were merely standing on a frame-work fixed to the ground.

The tank for oil was standing on the ground.

[1] Sec. 23 of Stat. 11 and 12 Vict. c. 21 :—And be it enacted, that if any such insolvent shall at the time of filing his petition, or at the time of filing the petition on which an adjudication of insolvency shall be made by the consent and permission of the true owner thereof, have in his possession, order or disposition any goods or chattels whereof such insolvent is reputed owner, or whereof he has taken upon him the sale, alteration or disposition as owner, the same shall be deemed to be the property of such insolvent, so as to become vested in the Official Assignee of the Court by the order made in pursuance of this Act.

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The wheat-cleaning machine was fixed to the beam.

One saw-cutting lathe was fixed to the ground with saws on wooden beams.

One hoist with chain was fixed on the second floor to a wooden stool or a horse.

The horse was fixed to the floor to shaftings on the floor.

The hoist was a crane and was fixed; three centrifugal machines were fixed on the first floor—one end to the floor, the other end to the roof.

Three cranes for raising grinding stones—they were not fixed to the ground but to the grinding machine which was fixed to the ground. Two blowers were fixed to the beam on the ground floor.

Box with drilling tools was not fixed.

The drilling tools were for drilling. They were specially sent for from Europe to drill holes.

They belonged to this mill's machinery.

They were used with the screw-cutting lathe and belonged to that machine.

Manji and Visram put in the engine boiler and mill stones—some of the articles since I was employed. The others were there when I was first employed.

Everything is removeable. The masonry could have to be taken.

The machinery has been sold but not removed.

All the articles I mentioned belonged to Visram Meghji.

If Visram had got notice to quit he could have removed them all at great expense.

Some injury would be caused to the machinery by the removal.

It was an iron chimney, and very easily they could have been removed.

The boiler is in a 4-feet hole, there cement is put in and gullies and masonry work put on all sides.

The boiler is built with masonry work all round. It is not rivetted to masonry.

The machinery is fixed so that it may work properly: you could not work it without its being fixed.

Russell, J., held that such of the above articles as were "fixed" were immoveable property and were exempt from the operation of section 23 of the Insolvency Act and were not goods and chattels within the said section, and as to those articles which were not "fixed" he held that they were moveable property of which the plaintiff was *not* the true owner within the meaning of the section and that they therefore did not pass on his insolvency to the Official Assignee. He therefore passed a decree for the plaintiff.

The first defendant (Official Assignee) appealed.

*Scott* (Acting Advocate General) and *Jardine* for the appellant (Official Assignee).

They cited section 23 of the Indian Insolvency Act (Stat. 11 and 12 Vict. c. 21); Yate Lee on Bankruptcy (3rd Ed.) pages 294 and 370; *Hawtry* v. *Butlin*[1]; Transfer of Property Act (IV of 1882), section 3; *Shuttleworth* v. *Hernaman*[2]; *Ex-parte Sykes*[3]; *Bryson* v. *Wylie*[4]; *Mather* v. *Fraser*[5]; *Longbottom* v. *Berry*[6]; *Harold* v. *Eastwood*[7]; *Ex-parte Loyd*.[8] If the articles attached to the earth became immoveable property, they did not pass under the Indenture as it was not registered—*Najibulla* v. *Nusir Mistri*.[9]

*Robertson* and *Rivett-Carnac* for respondent (plaintiff):—

They cited *Whitmore* v. *Empson*[10]; *Ex-parte* v. *Astbury*[11]; *Green* v. *Cole*[12]; *Hallen* v. *Runder*[13]; *Lee* v. *Gaskell*[14]; *Exparte Spicer*.[15]

As to registration, they cited *Sheo Sunkur* v. *Hirdey Narain*[16]; *Har Sahai* v. *Chunni Kuar*[17]; *Narasamma* v. *Subbarayudu*.[18]

JENKINS, C.J.:—By an instrument of the 23rd of June, 1893, the defendant Vishram Meghji covenanted with the plaintiff that the machinery, engines, plant, stock, implements, utensils, trade fixtures, chattels and effects specified in a schedule thereto should stand charged with, and continue to be a security to the plaintiff for a sum of Rs. 8,000, then advanced, and power was thereby vested in the plaintiff to sell the same on default in payment.

In March, 1899, while there was still a large sum due to the plaintiff, Vishram filed his petition under the Act for the Relief of Insolvent Debtors, and thereby his assets became vested in the Official Assignee, who is now represented by Mr. Macleod, the present incumbent of that office.

The Official Assignee contended that the articles specified in

(1) (1873) L. R. 8 Q. B. 293.
(2) (1857) 1 DeG. & J. 322.
(3) (1850) 13 Jur. 486.
(4) (1797) 1 B. & P. 83 (note).
(5) (1856) 2 K. & J. 536.
(6) (1870) L. R. 5 Q. B. p. 137.
(7) (1850) 20 L. J. (Ex.) 154.
(8) (1834) 3 Dea. & Chitty, 765 at p. 790.
(9) (1881) 7 Cal. 196.
(10) (1856) 23 Beav. 313.
(11) (1869) L. R. 4 Ch. 630.
(12) 2 W. Saund. 656.
(13) (1834) 1 Cr. M. & R. 266.
(14) (1876) 1 Q. B. D. 700.
(15) (1837) 2 Dea. 335.
(16) (1879) 6 Cal. 25.
(17) (1881) 4 All. 14.
(18) (1895) 18 Mad. 364.

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the schedule to the instrument were in the possession, order or disposition of the insolvent with the consent of the true owner, and so vested in him. The plaintiff combated this contention, and the articles having by consent been sold, he has brought this suit to establish his right to be paid out of the proceeds.

The case was heard by Mr. Justice Russell, who decided in plaintiff's favour as to such of the articles as were "fixed" on the ground that they were not goods and chattels, and as to such as were not "fixed" on the ground that the plaintiff was not the true owner. From this decision the Official Assignee has appealed.

*Shuttleworth* v. *Hernaman*[1] clearly shows (and it has been conceded by Mr. Robertson that the decision of Russell, J., in this case cannot be supported so far as it proceeds on that ground) that the plaintiff was not the true owner of the articles not "fixed." To that extent therefore the decree must in any case be varied, for these articles were clearly in the insolvent's possession.

It remains then to consider what are the rights of the parties in relation to the "fixed" articles, but before going into this there is a matter which requires explanation. The evidence on the record as to the extent and purpose of annexation is meagre, and Mr. Robertson has told us how this came about. On the evidence-in-chief of Jamsetji Sorabji, the learned Judge was satisfied that with the exception of three or four articles the plaintiff had made out a *prima facie* case of the scheduled assets being fixtures, and he intimated this opinion, and that he should so hold unless the defendants by examination or their own evidence established the contrary. Mr. Raikes, it is said, did not quarrel with this, and it was practically taken as proved that with the above exceptions the scheduled assets were fixtures. Mr. Raikes unfortunately is not here, but Mr. Justice Russell's own recollection and his note of Mr. Raikes' argument bear out Mr. Robertson's statement, which I shall therefore take to be correct.

Were the annexed articles, goods and chattels in the possession, order or disposition of the insolvent with the consent of the true owner and was the insolvent the reputed owner thereof within section 23 of the Indian Insolvent Act? That Act was passed

(1) (1857) 1 DeG. & J. 322.

by the English Legislature, and is practically, so far as the doctrine of reputed ownership goes, identical in its terms with the earlier English Bankruptcy Acts. Therefore reference to the pertinent English decisions is legitimate and proper.

It has been conclusively established in England that fixtures are not goods and chattels within the rule of reputed ownership. This was decided in the leading case of *Horn* v. *Baker*,(1) which has been consistently followed. In illustration of this I may refer to *Clark* v. *Crownshaw* (2); *Coombs* v. *Beaumont*(3); *Ex-parte Barclay*.(4) The principle is fully discussed by Lord Cranworth in *Ex-parte Barclay*. (His Lordship referred to the judgment in this case and continued.)

This case makes it clear that the fact of the articles being removeable by a tenant makes no difference; they still are fixtures to which the doctrine does not apply. In my opinion the same rule should apply in the town of Bombay.

But then it is said that it is a circumstance in favour of the Official Assignee, that the articles were charged by the deed of 1893, apart from the immoveable property to which they were annexed. I fail to see how in the reputation of ownership arising out of possession this makes any difference, and that it does not is shown by *Whitmore* v. *Empson*.(5)

The case of *Ex-parte Sykes*(6) was much pressed on us by the Official Assignee in this connection. From the report of the case it would not seem that anything was decided, which the Official Assignee can call in aid, and this view is borne out by a footnote at page 407 of 5 D. M. & G., where it is stated, "According to the note which one of the present Reporters took of the case, nothing was decided except that the claim of the plaintiffs was too doubtful to entitle him to the common mortgagee's order in Bankruptcy."

The conclusion then to which I come is that the annexed articles, located as they were, were not goods and chattels in the possession, order or disposition of the insolvent as their reputed owner, and that they therefore were not in his reputed ownership.

(1) (1808) 9 East. 215.
(2) (1832) 3 B. & Ad. 804.
(3) (1833) 5 B. & Ad. 72.
(4) (1855) 5 D. M. & G. 403.
(5) (1856) 23 Beav. 313.
(6) (1850) 13 Jur. 486.

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But then it is said, if this be so, the charge was invalid for want of registration, and it is propounded as a necessary dilemma that the articles must either be goods and chattels, or they must be immoveable property, and, if immoveable property, then they would be unaffected by any document, unless duly registered. But do the alternatives proposed exhaust all possible cases? Must a subject-matter be immoveable property within the meaning of the Registration Act, or be subject to the doctrine of reputed ownership? It is clear on the English cases that fixtures, though not goods and chattels within the reputed ownership section, need not be land (*Hallen* v. *Runder*[1]; *Lee* v. *Gaskell*[2]). Therefore the dilemma does not *ex vi termini* arise. So here the question whether these fixtures are immoveable property must be decided on the wording of the Registration Act and independently of any conclusion as to their not being goods and chattels under section 23 of the Insolvent Act. The Registration Act makes compulsory the registration of all assurances of immoveable property, and so I have to see whether the instrument in suit is such an assurance. Immoveable property is by section 3 said to include "Land, buildings, hereditary allowances, rights to way, lights, ferries, fisheries or any other benefit to arise out of land and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops, or grass." Of the annexed articles none were attached to the earth; they were at most fastened to that which was attached to the earth. That, however, is not enough; they must have been "permanently fastened." The evidence, as I have already said, is meagre as to the extent and intention of annexation, but looking to the fact that the insolvent who erected them was only a monthly tenant, I am unable to hold that they were permanently fastened; on the contrary, I think they were not. Therefore section 17 of the Registration Act does not apply.

I therefore think that to the articles which were not "fixed" the Official Assignee has a good title. They would be those numbered 9, 10, 11 and 18 in the schedule: to the rest he has no title.

The chattels for the purpose of this decree being by consent taken to be of the value of Rs. 750, we declare that the Official

(1) (1834) 1 C. M. & R. 266. (2) (1865) L. R. 1 Q. B. 700.

Assignee is entitled to that sum with such interest as may have been raised in respect thereof and that the plaintiff is entitled to the balance of the fund in the Official Assignee's hands, and decree accordingly.

We do not disturb the Judge's order as to costs, but the respondent will only get half his costs of the appeal.

Attorneys for plaintiff—*Messrs. Payne, Gilbert and Sayani and Moos.*

Attorneys for the Official Assignee (defendant 1)—*Messrs. Mansukhlal, Damodar and Jamsetji.*

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## CRIMINAL REFERENCE.

*Before Mr. Justice Ranade and Mr. Justice Fulton.*

IMPERATRIX *v.* RATNYA.*

1897.
*November* 3.

*Jurisdiction—Scheduled Districts—Reference and appeal in a criminal case from the Scheduled Districts—Act No. XI of 1846—Scheduled Districts Act XIV of 1874.*

The Collector of Khándesh, in his capacity of Political Agent for the Mehwási Estates, convicted the accused of murder committed at a village in the Scheduled Districts, and sentenced him to transportation for life. He then forwarded the proceedings to Government for confirmation. The accused also appealed to Government against the conviction and sentence. The Government thereupon directed the Political Agent to submit the proceedings to the High Court under Rule 35 of the Rules promulgated in 1855 under section 3 of Act XI of 1846. The appeal presented by the accused was also forwarded to the High Court. The question arose as to whether the High Court had jurisdiction to dispose of the reference.

*Held*, that the High Court had jurisdiction.

REFERENCE by A. Cumine, Collector of Khándesh and Political Agent of the Mehwási Estates of Kathi in the Khándesh District, under section 7 of the Scheduled Districts Act No. XIV of 1874 in a murder case.

The accused was charged under section 302 of the Indian Penal Code (Act XLV of 1860) with having committed murder at Piprapani, a village belonging to the Mehwási Estate of Kathi,

* Criminal Reference No. 104 of 1897.

1897.

IN PERATRIX v. RATNYA.

a Scheduled District under Act XIV of 1874, in the Khándesh District. He was tried by the Collector of Khándesh as Political Agent of the Mehwási estate of Kathi, and was found guilty and sentenced to transportation for life. After the conviction and sentence the Political Agent forwarded the papers of the case to Government for confirmation, but Government having directed him to submit the proceedings to the High Court in accordance with Rule XXXV of the Rules made under Act XI of 1846,(1) he made the present reference. The accused also appealed to Government against the conviction and sentence, and his appeal was forwarded to the High Court along with the proceedings, and was registered as No. 593 of 1897.

There was no appearance for either party.

(1) (1) Sections 3 and 4 of Act XI of 1846, entitled an Act for the exemption of certain territory in the province of Khándesh and the zilla Ahmednagar from the operation of the General Regulations :

3. And it is hereby enacted that it shall be competent to the said Governor in Council by an order in Council to prescribe such rules as he may deem proper for the guidance of the Agent aforesaid and of all the officers subordinate to his control and authority, and to determine to what extent the decision of the Agent in civil suits shall be final and in what suits an appeal shall lie to the [Sadar Dewani Adalat], and to define the authority to be exercised by the Agent in criminal trials and what cases he shall submit to the decision of the [Sadar Foujdari Adalat].

4. And it is hereby enacted that upon the receipt of any criminal trials referred by the Agent under the rule which may be hereafter prescribed by the Governor in Council [the Sadr Fouzdari Adalat] shall proceed to pass a final judgment, or such other order as may after mature consideration seem to the Court requisite and proper, in the same manner as if the trial had been sent up in ordinary course from a Sessions Judge.

(2) Rule XXXV of the rules promulgated under section 3 of Bombay Act XI of 1846 :

XXXV.—The absolute jurisdiction of the Agent in criminal cases shall extend to fine and imprisonment for (5) five years with or without hard labour ; and sentences involving a punishment beyond that period or of greater severity must be submitted for the confirmation of the Sadar Fouzdari Adalat.

(3) Section 7 of Act XIV of 1874 :

7. All rules heretofore prescribed by the Governor General in Council or the Local Government for the guidance of officers within any of the Scheduled Districts for all or for any of the purposes mentioned in section 6, and in force at the time of the passing of this Act, shall be continued to be in force unless and until the Governor General in Council or the Local Government, as the case may be, otherwise directs.

All existing officers so appointed previous to the date on which this Act comes into force in such district shall be deemed to have been appointed hereunder.

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RANADE J.:—In this case the Collector of Khándesh, acting in his capacity as Political Agent for the Mehwási estates, tried the accused Ratnya on a charge of the murder of his wife at Piprapani village belonging to the Kathi estate, and sentenced the accused to transportation for life, subject to the confirmation of the sentence by His Excellency the Governor in Council. The accused also presented a petition of appeal to the same authority. His Excellency the Governor in Council, however, directed the Political Agent to submit the proceedings to this Court, and the present reference was accordingly made by the Political Agent under Rule 35 of the Rules promulgated in July, 1855, under the powers conferred on Government by section 3 of Act XI of 1846.

Rule 25 invests the Agent with the functions of a Magistrate. Rule 32 empowers him to take cognizance of all crimes and offences perpetrated within the limits of his political charge, and Rule 35 gives him absolute jurisdiction to sentence offenders to fine and imprisonment for five years, and it directs that sentences involving punishment beyond that term or of greater severity must be submitted for confirmation to the Sadar Fouzdari Adalat. Rule 43 directs the Political Agent to forward the record of such cases, when confirmation is necessary, to the Sadar Fouzdari Adalat, and Rule 44 empowers the Adalat to call for proceedings on petition from the prisoner sentenced in such cases, and thereafter to deal with them as laid down in section 4 of Act XI of 1846. Section 4 of this latter Act provides that the Sadar Fouzdari Adalat shall in such confirmation cases pass the final sentence or order in the same manner as if the trial had been sent up in ordinary course by Court of Session. The present reference to this Court comes up for disposal under these provisions, and the point we have to consider is whether this Court possesses the jurisdiction which belonged to the late Sadar Fouzdari Adalat to deal with such cases either by way of confirmation or by way of appeal.

There have not been many occasions for the exercise of this jurisdiction since the constitution of the High Courts. In the only reported case, *Queen-Empress* v. *Sarya*,[1] a Division Bench

(1) (1890) 15 Bom. 505.

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of this Court (Birdwood and Jardine, JJ.) held that in cases where the sentence passed by the Political Agent was within the limits of the absolute jurisdiction of that officer, no appeal lay to this Court. Their Lordships held that Rule 44 noticed above was *ultra vires*. Birdwood, J., observed that there is no provision in Act XI of 1846 which empowers Government to confer appellate powers on the Adalat as done by Rule 44, and that rule cannot be regarded as a valid rule made under the Act. He makes a distinction between the rule relating to appeals and the rule directing references to be made to the Sadar Fouzdari Adalat, for he admits that the Act did contemplate that Court as a Court of reference for the confirmation of sentences passed in certain criminal trials. The present case, so far as it is such a reference, would thus, in the opinion of Birdwood, J., not be excluded from the jurisdiction of the Sadar Fouzdari Adalat, and therefore (under section 9 of the High Courts Act, and section 27 of the Letters Patent) of the High Court, which has taken up the place of the old Fouzdari Adalat in respect to all manner of jurisdiction. Jardine, J., indeed went much further. While agreeing with Mr. Justice Birdwood in his view that Rule 44 was *ultra vires*, Jardine, J., expressed an opinion to the effect that after the enactment of Act XIV of 1874 which repealed Act XI of 1846, these rules under the old Act ceased to be in force, so far as they had reference to the powers of this Court. He was of opinion that section 7 of Act XIV of 1874 did not continue these rules except so far as they related to the Political Agent and his officers, as they cannot be regarded as being in force at the time when the Scheduled Districts Act (XIV of 1874) was passed, and they were in conflict with the Letters Patent of the High Court. These remarks, it will be seen, have a larger bearing than the validity or otherwise of Rule 44. My colleague, Mr. Justice Fulton, is of opinion that section 7 of Act XIV of 1874 continued the rules of 1855 framed under Act XI of 1846, and that in consequence the powers of this Court as a Court of reference for confirmation purposes were continued. I am myself inclined to hold that this confirmation jurisdiction of the Sadar Fouzdari Adalat was in force under the operation of Act XI of 1846 and

the rules of 1855 at the time when the High Court was constituted, and that until a fresh notification to the contrary has been issued under Act XIV of 1874 cancelling the rules of 1855, they must be held to be still in force by virtue of section 7 of Act XIV of 1874. The notifications of 1879 and 1887 have clearly not the effect. The rules of 1855 so far as they relate to confirmation proceedings are clearly contemplated by Act XI of 1846, and were in force in 1862, and are therefore still in force, and confer this jurisdiction on the High Court. As the point under consideration is, however, not entirely free from difficulties, I agree with Mr. Justice Fulton that it would be desirable to issue notice to the Political Agent and the accused, and to hear further argument in the case before the reference is finally disposed of.

As regards the Appeal No. 593 of 1897, the precedent is more in point, but there is the consideration that in *Queen-Empress* v. *Sarya*,[1] the sentence passed was for five years within the absolute jurisdiction of the Political Agent, while the sentence in the present case clearly exceeds his jurisdiction, and certainly requires the confirmation of either this Court or of the Government. I would direct therefore, before admitting the appeal or disposing of the reference, that notices be issued to the Political Agent and the prisoner.

FULTON, J. :— In this case the Agent to His Excellency the Governor in Khándesh has submitted for the confirmation of this Court his proceedings in which he has convicted the prisoner of murder in the Mehwási Estate of Kathi, and sentenced him to transportation for life. The reference is one for which no precedent has been brought to our notice, and raises a question of considerable difficulty as to the jurisdiction of the Court.

By Act XI of 1846, which was passed to exempt certain Mehwási Estates from the civil and criminal jurisdiction of the ordinary Courts, it was enacted that the Governor in Council might prescribe such rules as he deemed proper for defining the authority of the Agent in criminal trials, and for determining what cases the Agent should submit for the decision of the Sadar

(1) (1890) 15 Bom. 505.

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Fouzdári Adálat. It was further provided that "on receipt of any criminal trials referred under the said rule, the Sadar Fouzdári Adálat should proceed to pass a final judgment, or such other order as might after mature consideration seem to the Court requisite and proper, as if the trial had been sent up in the ordinary course by a Sessions Judge." It must be remembered that in 1846, when this Act was passed, the procedure prescribed by Regulation 13 of 1827, section 2, and Regulation 3 of 1830 required the Sessions Judge to submit for confirmation not merely sentences of death but also sentences of transportation or imprisonment for life. In 1855, rules which will be found on pages 1342—1346 of the Government Gazette for that year, were accordingly made. Rule 35 provided that the absolute jurisdiction of the Agent in criminal cases should extend to fine and imprisonment for five years, and directed that sentences involving punishment beyond that period, or of greater severity, should be submitted for the confirmation of the Sadar Fouzdári Adálat. Rule 43 declared that if the punishment deemed suitable by the Agent should exceed his own absolute jurisdiction, he should record the punishment he would award, and should forward the case in original to the Sadar Fouzdári Adálat, which Court should proceed to take cognizance of the case, and to pass such sentence or order as they might think proper, and that the instructions conveyed to the Agent from the superior Court should be carried into effect by him. Rule 44 purported to give the Sadar Fouzdári Adálat power to call for the Agent's proceedings in any case on petition being made to that Court by any party against whom a sentence might have been passed by the Agent, and thereafter to proceed according to the provisions of section 4 of Act XI of 1846.

In the case of *Queen Empress* v. *Sárya*[1] some prisoners who had been sentenced to five years' imprisonment by the Agent for an offence committed in one of the mehwási villages petitioned the High Court. Their Lordships treating the petition as an appeal rejected the application on the ground that Rule 44 was *ultra vires* as beyond the provisions of Act XI of 1846. This decision does not directly affect the case now under consideration, but the laborious researches of the learned Judges who decided

(1) (1890) 15 Bom. 505.

it help most materially in enabling us to dispose of the question now before us. Accepting the conclusion that Rule 44 was *ultra vires*, and that the Sadar Fouzdári Adálat had under the Act no jurisdiction as a Court of Appeal or Revision in respect of sentences not exceeding five years, it seems nevertheless that its jurisdiction in the case of sentences beyond that term was unquestionable, being expressly provided for by the Act. The Criminal Procedure Code of 1861 did not extend to non-regulation districts (*vide* section 445), and as it did not touch Act XI of 1846, it left unaffected the jurisdiction of the Agent to refer and of the Sadar Fouzdári Adálat to deal with cases like the present. In 1862 the High Court was established under 24 & 25 Vic., c. 104, the 9th section of which enacted that its jurisdiction should be determined by Letters Patent save in so far as it might subsequently be modified by legislation. The original Letters Patent were issued in that year. Clause 27 provided that the High Court should be a Court of reference and revision from the criminal Courts subject to its appellate jurisdiction and should have power to hear and determine all such cases referred to it by the Sessions Judge, or by any other officers authorized to refer cases to the Sadar Fouzdári Adálat, and to revise all such cases tried by any officer or Court possessing criminal jurisdiction as were then subject to reference to or revision of by the said Court of Sadar Foujdári Adálat.

Now it seems to me clear that this clause preserved to the High Court the powers of the Sadar Fouzdári Adálat as a Court of reference from the decisions of the Agent in all cases which he was authorized to refer to the Sadar Fouzdári Adálat. It is true no appeal lay from his decisions to the Sadar Fouzdári Adálat, or subsequently to the High Court; but the express provision that the High Court should have power to hear and determine all such cases referred to it by any officer possessing criminal jurisdiction as were subject to reference to the Court of Sadar Fouzdári Adálat, when read with section 9 of the High Court Act, makes it plain that this jurisdiction was retained. If the clause had stood by itself it might perhaps have been argued that the word "and" was explanatory, and that the High Court was only a Court of reference and revision in respect of Courts from which an appeal lay

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to it. But looking to section 9 of the Act, such a construction becomes impossible, for it cannot be said that the Letters Patent have made any direction curtailing the jurisdiction so as to exclude a class of cases formerly dealt with by the Sadar Fouzdari Adalat. Such a curtailment would be most unlikely, for it could hardly be intended to leave such cases wholly unprovided for, and if it had been so intended the matter would have doubtless been expressed in clear terms so as distinctly to remove it from the comprehensive provisions of section 9. Moreover, there was no appeal to the High Court from the decisions of Magistrates, and yet certain Magistrates were under section 404 of Act XXV of 1861 empowered to refer cases to the Sadar Fouzdari Adalat, and no question was ever raised as to the continuance of such references after the establishment of the High Court. The amended Letters Patent of 1865 made no change. They simply continued the powers conferred by the earlier Letters Patent on the High Court as a Court of reference. The situation was not altered by the enactment of the Criminal Procedure Code of 1872. It extended to the whole of British India, but preserved all special forms of procedure prescribed by any law not expressly repealed. Act XI of 1846 remained in force, and the arrangements under it were not altered. Then came Act XIV of 1874, which was introduced in the Mehwási villages in the manner explained in *Queen Empress* v. *Sarya*. It repealed Act XI of 1846, but by section 7 preserved the rules under it. For the purposes of this case the repeal of the Act is immaterial. The rules prescribing the procedure to be followed by the Agent thenceforward derived their validity not from Act XI of 1846 but from section 7 of Act XIV of 1874. They authorized him to make a reference like the present, and clause 28 of the Letters Patent gave the High Court jurisdiction to hear and determine the case when referred. The High Court's jurisdiction never rested immediately either on Act XI of 1846 or on the rules made under it, but simply on the Letters Patent based on section 9 of the High Court Act 24 & 25 Vict., c. 104.

The only other enactment to which it is necessary to refer is the existing Code of Criminal Procedure. It like its predecessor applies to the whole of British India, but as in the absence of

specific provision to the contrary it does not affect any special or local law, or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law now in force (see section 7 of Act XIV of 1874), it does not touch the Agent's jurisdiction to refer the case, or the power conferred on us by the Letters Patent to hear and determine it.

From the foregoing review of the course of legislation on this subject, it appears to me that the High Court has jurisdiction to hear and determine the present reference. The case itself is of a simple nature, and presents no special difficulty, but as probably the accused, whose petition is addressed to the Governor in Council, is unaware that we are going to deal with it, I think it would be desirable to direct notice to be given to him before we finally dispose of it.

*Note*:—After giving notice to the accused the High Court considered the reference, confirmed the conviction and sentence and rejected the appeal.

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## APPELLATE CRIMINAL.

*Before Mr. Justice Candy and Mr. Justice Fulton.*

KING-EMPEROR *v.* BALA AND NARAYAN.*

1901.
*April* 9.

*Criminal Procedure Code (Act V of 1898), sections 337 and 339—Criminal Procedure—Pardon tendered and accepted—Evidence given and pardon withdrawn by Magistrate—Forfeiture of pardon must be proved—When may forfeiture be declared and pardon withdrawn—Practice.*

A committing Magistrate, having, under section 337 of the Criminal Procedure Code (Act V of 1898), tendered a pardon to one of three accused persons, examined him as a witness. Subsequently, however, the Magistrate, under section 339 of the Code, withdrew the pardon on the ground that the accused had wilfully concealed a certain fact connected with the offence, and he committed him along with the other accused for trial at the Court of Sessions, where he was found guilty. In giving judgment the Sessions Judge expressed his opinion that the withdrawal of the pardon by the Magistrate was illegal, (1) because such withdrawal could not be made until the close of the trial and should be made by the Court of Sessions, and (2) because the fact, the alleged concealment of which was the ground of the withdrawal, had not been proved. The accused, however,

* Criminal Appeal No. 56 of 1901.

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was found guilty and sentenced. On appeal to the High Court—

*Held*, that the conviction and sentence should be set aside on the ground that it had not been proved that the pardon had been forfeited under section 339 of the Criminal Procedure Code (Act V of 1898). The alleged fact, the concealment of which was the ground for withdrawing the pardon, had not been proved. If the pardon which had been granted had not been forfeited under section 339, it was still in force and the accused should be discharged.

As the law stands the question in such cases is whether the accused has forfeited his pardon by some act of his own. The question is one of fact in which the Magistrate may hold one opinion and the Sessions Judge another as may happen in the case of any other question of fact in issue in the case. The Sessions Court has to determine for itself on the evidence whether the pardon has been forfeited: for if not, the accused, who has accepted such pardon, cannot be tried.

*Quære*,—Whether the examination at the committal proceedings before the Magistrate of a person who has accepted a pardon satisfies clause 2 of section 337 of the Code which provides that every such person shall be examined as a witness "in the case" or whether such person must be examined as a witness at the "trial."

*Queen-Empress* v. *Bhau*[1] doubted.

APPEAL against the conviction and sentence recorded by E. M. Pratt, Sessions Judge of Sholápur-Bijápur, in criminal case No. 49 of 1900.

The accused (1) Bala Narsagavda and (2) Narayan Davlat were charged with the murder of one Meera. The deceased's wife Ameena was charged with abetment of the offence.

In the course of the investigation before the Magistrate on the 4th September, 1900, Narayan Davlat (accused No. 2) was tendered a pardon under section 337, of the Criminal Procedure Code (Act V of 1898) on condition of his making a full and true disclosure of all the facts within his knowledge, and he was examined as a witness on the same day.

On the 6th September the pardon was withdrawn by the Magistrate on the ground that Narayan had not disclosed a certain fact within his knowledge, and Narayan was committed for trial along with the other two accused to the Court of Sessions at Sholápur-Bijápur.

The Sessions Judge, however, was of opinion that it was necessary under section 337 (2) of the Criminal Procedure Code (Act V of 1898) that Narayan should be examined as a witness at the trial, and that the Magistrate was wrong in withdrawing

(1) (1898) 23 Bom. 493.

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the pardon before the trial in the Sessions Court had begun. He therefore referred the matter (No. 114 of 1900) to the High Court, requesting that Narayan's commitment might be quashed. On that reference the High Court passed the following order:

The Sessions Judge should proceed with the case. The accused Narayan Davlat was examined as a witness by the Magistrate, who withdrew the pardon, as in his opinion the condition on which it was granted was not complied with.

The Sessions Judge thereupon proceeded with the trial, and agreeing with the assessors found Bala and Narayan (accused Nos. 1 and 2) guilty of murder and sentenced them each to transportation for life. Ameena was found not guilty of the offence charged and she was discharged.

In passing judgment the Sessions Judge expressed his opinion that the withdrawal by the Magistrate of the pardon which had been tendered to Narayan and accepted by him was illegal: (1) because in his view the Magistrate had no power to withdraw it, such withdrawal not being legally possible until the close of the trial of the other accused, and only to be made by the Court of Sessions, (2) because the fact, the non-disclosure of which by Narayan was the ground of the withdrawal, had not been proved and was certainly not within Narayan's knowledge. In his opinion Narayan's evidence was true.

In his judgment the Sessions Judge made the following observation with regard to the case of Narayan:

I may add that I propose at the expiry of the period of appeal to move Government to grant accused No. 2 a pardon. The committing Magistrate tendered him a pardon and withdrew it as soon as he had given his evidence on the ground that he had concealed Nimgaoda's share in the murder. It seemed to me and—with due submission to the ruling of the High Court—it seems to me that this procedure was illegal. The Code does not say by whose order a tender of pardon may be withdrawn or the person to whom pardon has been tendered ordered to be tried. Section 337 (2) requires, however, that he should be examined as a witness in the case. This cannot be done if the tender of pardon is withdrawn before the trial has begun. The inference is that the law intends that the pardon should not be withdrawn by the Magistrate but by the Court of Session, or at any rate that the order for the trial should not be made until the close of the trial of the other accused. It is obvious that until the close of the trial all the materials by which the truth of the evidence given can be tested are not exhausted. Taking this view of the law I addressed the High Court to quash the commitment of accused No. 2, but I was directed to proceed with the trial.

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Now I do not concur with the reason given by the Magistrate for withdrawing the pardon. I think it probable that Nimgaoda was an accomplice, but I do not think it proved that he was. The assessors do not think that he was an accomplice at all. There is certainly no reason for supposing that he was an accomplice to the knowledge of accused No. 2. I think the evidence given by accused No. 2 was true, and if that evidence had been given before me, I should not have withdrawn the pardon. It is, however, not open to me to acquit him on this ground, for he does not plead that he gave true evidence.

The procedure followed has therefore led to this surprising result, that I am passing sentence on a man who I think ought to-day to be at liberty. The only way out of this *impasse* will be to address Government to give accused No. 2 the benefit of the pardon that the Magistrate tendered him. But perhaps the High Court may in appeal see their way to reconsider its order and quash his commitment and conviction.

Bala and Narayan appealed.

There was no appearance on either side.

CANDY, J.:—I concur with Mr. Justice Fulton in holding that the appeal of No. 1, Bala, should be dismissed, and that the conviction of No. 2, Narayan, should be set aside, and that he should be discharged. As I was a party to the order of this Court, dated 29th November 1900, declining to quash the commitment of accused Narayan, I may add that the case of *Queen-Empress* v. *Bhau*[1] was not brought to our notice nor were the numerous cases which are quoted in Sohoni's Criminal Procedure Code. Whether our order was correct or not, we cannot now reconsider it and quash the commitment. But it does not follow that the conviction of Narayan must stand. If it appears that his pardon has not been forfeited under section 339, then obviously it is still in force, and he must be discharged. I agree with the view taken by the Sessions Judge that the pardon has not been forfeited.

FULTON, J.:—I think that accused No. 1, Bala, has been rightly convicted and that his appeal should be dismissed.

As regards accused No. 2, Narayan, I am of opinion that the conviction must be set aside and that he must be discharged on the ground that it is not proved that the pardon granted to him by the Magistrate has been forfeited under section 339 of the Code of Criminal Procedure.

(1) (1898) 23 Bom. 493.

The learned Sessions Judge considered that the Magistrate who had tendered the pardon had no jurisdiction to commit the accused before the close of the trial of the other accused. In this view the Judge is supported by the decision of this Court in *Queen-Empress* v. *Bhau*.[1] But so far as the present case is concerned, the matter has been settled by the order of this Court of the 29th November, 1900, and cannot be reopened: *Imp.* v. *Fox*.[2] For the purposes of this case then, the commitment must be held to be good: and on the general question of the proper construction of section 337 it is sufficient to point out that I do not wish to be understood as concurring in the decision in *Queen-Empress* v. *Bhau*.[1] The section says that every person accepting a tender under this section shall be examined as a witness in the case, and I am doubtful whether it is correct to treat the word "case" as equivalent to "trial." A person accepting a pardon who is examined in the committal proceedings may be said, without inaccuracy, to be examined in the case; and it is not by any means certain that the Legislature was referring to his examination at the trial in the Sessions Court, when it said that he shall be examined in the case. In many instances it would obviously be unsafe for the Magistrate to hold that such person had forfeited his pardon until the trial of the co-accused had been concluded, but in other cases the perjury before the Magistrate might be so clear and palpable as to make it useless to delay the committal. It seems to me therefore impossible to lay down any rule applicable to all cases to determine at what stage it is expedient to commit an accused, who has in the opinion of the Magistrate forfeited his pardon; and I am inclined to think that the Legislature by using a general term like "case" instead of the word "trial" meant to abstain from laying down any such rule. It will be observed that in section 339 the word "withdrawn" in the former Code has disappeared and been replaced by the word "forfeited." As the law now stands, the question is whether the accused has forfeited his pardon by some act of his own—not whether the Magistrate has validly withdrawn it. This question is one of fact on which it is clear that the Magistrate may hold one opinion and the Sessions Court another, just as may happen

(1) (1898) 23 Bom. 493. (2) (1885) 10 Bom. 176.

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on any other question of fact at issue in the case. The Sessions Court has to determine for itself on the evidence before it whether the pardon has been forfeited: for if not, the accused, who has accepted such pardon cannot be tried. Here the Sessions Judge thought that Narayan was not proved to have wilfully concealed anything essential or to have given false evidence, differing on this point from the Magistrate, who thought that he had given false evidence and therefore committed him. I agree with the Sessions Judge. There may be some suspicion against Nimgouda, but the evidence does not disclose any case against him, in regard to which it can be said with any certainty that Narayan has wilfully concealed anything essential or given false evidence. His conviction therefore must be reversed and he must be discharged.

*Order accordingly.*

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## *FULL BENCH.*

## APPELLATE CRIMINAL.

*Before Sir L. Jenkins, Chief Justice, Mr. Justice Candy, Mr. Justice Fulton, Mr. Justice Crowe, and Mr. Justice Chandavarkar.*

KING-EMPEROR *v.* PARBHUSHANKAR.*

1901.

*April* 15.

*Criminal Procedure Code (Act V of 1898), sections 269 and 418—Offence triable with the aid of assessors tried in fact by a jury—Trial by jury—Appeal on a matter of fact—Practice—Procedure.*

Under section 418 of the Criminal Procedure Code (V of 1898) no appeal lies on matters of fact where an accused person is convicted by a jury on a charge which ought to have been tried with the aid of assessors.

An accused person was charged with and tried for offences under sections 302, 304 and 325 of the Penal Code (Act XLV of 1860). Under the first of these charges he was triable by a jury. Under the latter two he was triable with the aid of assessors. He was, however, tried for all three offences by a jury who found him guilty on the third charge. The Judge accepted the verdict and sentenced the accused to four years' rigorous imprisonment. The accused appealed.

* Criminal Appeal No. 4 of 1901.

1901.

KING-EMPEROR v. PARBHU-SHANKAR.

*Held*, by a Full Bench that under section 418 an appeal lay in this case on matters of law only and not on matters of fact.

*Per Jenkins, C.J.*—The words in section 418 of the Criminal Procedure Code, 1898, "when the trial was by jury" mean "when the trial in fact was by jury" and not "when the trial should have been by jury."

APPEAL from the conviction and sentence recorded by F. X. DeSouza, Sessions Judge of Ahmedabad.

The accused was committed to the Court of Session at Ahmedabad for trial on a charge of murder under section 302 of the Indian Penal Code (Act XLV of 1860).

At the commencement of the trial which was by jury the charge was amended by the addition of counts under sections 304 and 325 of the Code.

The latter offences were triable with the aid of assessors and not by a jury at Ahmedabad.

The Sessions Judge, however, proceeded with the trial on all the charges. The jury unanimously acquitted the accused of offences under sections 302 and 304 of the Indian Penal Code (Act XLV of 1860); but convicted him under section 325 of the Code. The Judge thereupon sentenced him to four years' rigorous imprisonment and a fine of Rs. 1,000.

Against this conviction and sentence the accused appealed to the High Court.

The appeal at first came on for hearing before a Division Bench (Candy and Chandavarkar, JJ.), who referred to a Full Bench the question "Whether an appeal in the present case lies on a matter of law only."

The following was the referring judgment.

CANDY, J.:—A preliminary point of considerable importance has arisen in this appeal. The question is, whether an appeal lies on matters of fact. Section 418 of the Criminal Procedure Code provides that "where the trial was by jury the appeal shall lie on a matter of law only." This trial was by jury. The accused was committed to the Court of Session of Ahmedabad on a charge of murder (section 302, Indian Penal Code). That was apparently the only charge framed by the Magistrate.

When the trial in the Sessions Court began, before the accused was called on to plead, the charge was amended (presumably by

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direction of the Sessions Judge) by the addition of counts under sections 304 and 325 of the Indian Penal Code. Such offences are not triable by a jury at Ahmedabad. Therefore, under section 269 (3) of the Criminal Procedure Code, the accused should have been tried for these latter offences by the Court of Session with the aid of the jurors as assessors.

This provision of the law was apparently not followed by the Sessions Judge. He charged the jury on all three counts, and indicated the circumstances under which it was, he said, open to the jury to convict of culpable homicide not amounting to murder or of voluntarily causing grievous hurt. The jury returned the unanimous verdict that accused was not guilty of murder, nor of culpable homicide not amounting to murder, but that he was guilty of voluntarily causing grievous hurt under section 325 of the Indian Penal Code, and that he was sane when he committed the act. On this the Sessions Judge, accepting the unanimous verdict of the jury, found the accused guilty of an offence under section 325 of the Indian Penal Code, and sentenced him.

Section 536 of the Criminal Procedure Code provides that if an offence triable with the aid of assessors is tried by a jury, the trial shall not, on that ground only, be invalid.

So here the trial was not invalid because the Sessions Judge did not ask the jurors as assessors for their opinions on the charges under sections 304 and 325. But still the fact remains that "the trial was by jury," in which case the appeal shall lie on a matter of law only. To apply the language of Parsons, Acting C.J., in *Queen-Empress* v. *Jeyram*,[1] "the procedure of the Sessions Judge was clearly most irregular, but it appears on the authorities that we must accept the trial by jury as a legal one," and, if the Sessions Judge disagrees with the verdict of the jury on the charge of an offence which should properly have been tried with the aid of the jurors as assessors, he should submit the case under section 307. In other words, as "the trial was by jury," and was a "legal trial," the Sessions Judge could not treat the verdict of the jurors as the opinion of assessors, and record a finding in opposition to that verdict and opinion.

(1) (1899) 23 Bom. 696, p. 697.

In the above case, Parsons, Acting C.J., referred to the decision of this Court in *Imp.* v. *Dev Vithu*.[1] In this latter case the second accused was tried on charges under sections 457 and 380 of the Indian Penal Code. The first charge was triable by jury; the second with the aid of the jurors as assessors. The Sessions Judge took the verdict of the jurors on both charges (which was one of acquittal), and did not require each of the jurors as assessors to state his opinion orally on the charge under section 380, but referred the whole case to the High Court under section 307. The High Court upheld the verdict of acquittal on the charge of an offence under section 457, and then proceeded to deal with the charge of the offence under section 380. The learned Judges (Jardine and Telang, JJ.), relying on the Calcutta decision in *Bhootnath Dey's* case,[2] held that there had been a trial by jury of the charge of an offence under section 380, and that therefore the Sessions Judge had jurisdiction to refer the verdict to the High Court, and thus that the High Court could convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it. Their Lordships then convicted the accused of an offence under section 380. In other words, the second accused was deprived of his right of appeal, which he would have been able to exercise had the Sessions Judge been directed to record a judgment, after considering the opinions of the jurors as assessors. Their Lordships did not directly refer to this point, but they remarked: "Any prejudice which prisoner might incur is prevented by our practice of giving him notice of the hearing of the reference, and so great is the respect of the High Courts for verdicts of juries that a prisoner so acquitted has an advantage, as a general rule, over one in whose favour there are only the opinions of assessors."

Their Lordships also remarked that the decision in *Bhootnath Dey's* case was passed after consideration of *Empress* v. *Mohim Chunder Rai*,[3] in which the opinion was expressed by Maclean, J. (Mitter, J. *dubitante*) that "the prisoners, who would have been entitled to an appeal on the facts, if the case had been tried

(1) (1892) Cr. R. No. 19. (2) (1879) 4 Cal. L. R. 495.

(3) (1878) 3 Cal. 765.

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with assessors, are not debarred from that merely by the fact that their trial by jury is not invalid. An error of procedure not affecting the merits of the case ought not to affect the prisoners' right of appeal."

In our opinion the question is not what ought to be the case, so much as what is the law. Nothing would have been easier than for the Legislature to insert in clause 1 of section 536 a provision preserving the right of appeal on facts. If, following the Bombay ruling above quoted, we must hold here distinctly that the case under section 325 was tried by a jury, then the law says that there shall be an appeal on a matter of law only.

*Bhootnath Dey's* case was followed by the Calcutta High Court in *Surja Kurmi* v. *Queen-Empress*,[1] in which the Sessions Judge, treating the verdict of the jury as the opinion of assessors, recorded a judgment, convicting the accused of an offence which was triable with the aid of assessors. The High Court (Hill and Stevens, JJ.) set aside the conviction and remanded the case to the Sessions Judge in order that he might deal with it according to law by passing an order either under section 306 or 307 of the Criminal Procedure Code. The Court held that the case was "tried by a jury" within the meaning of section 536. If so, then it was equally a "trial by jury" within the meaning of section 418. Conviction or acquittal cannot make any difference in the fact that the trial was by jury. If in a case which should have been tried with the aid of assessors, there is in fact a valid trial by a jury, and in such a case the Sessions Judge cannot (as shown in the rulings quoted above), treating the verdict of jurors as opinions of assessors, record a judgment, but must, if he disagrees with the verdict, refer the case to the High Court, then it is difficult to see how in a similar case the High Court can treat the verdict of the jury as their opinion as assessors.

In the case of *Imperatrix* v. *Lalbu*[2] the Sessions Judge tried the accused by jury, the charges being of offences under sections 302 and 318 of the Indian Penal Code. The charge under section 318 was not triable by Jury. The jury acquitted accused on both charges. Government appealed. This Court (Parsons and

(1) (1898) 25 Cal. 555.

(2) (1898) Cr. R. No. 15.

Ranade, JJ.), taking the verdict of the jury to be their opinions as assessors, went into the facts, and found that accused had committed an offence under section 318, and convicted and sentenced her. Obviously, if the law allows an appeal on facts in such a case when there is an acquittal, there should equally be an appeal on facts where there is a conviction. The difficulty is that the words of the law (section 418) are "where the trial was by jury." If the words were "except where the conviction or acquittal was of an offence triable by jury," then there would be no difficulty. And this would meet the case of a conviction under the provisions of section 238 of the Criminal Procedure Code, according to which an accused may be convicted of a minor offence, though he is not charged with it. In the present case before us, if the Sessions Judge had not added the counts under sections 304 and 325, would it not still have been open to the jury to convict of an offence under either of those sections? Would there then have been an appeal on facts as the law now stands? The "trial was by jury."

In the case of *Queen Empress* v. *Jeyram*,[1] noted above, Parsons, Acting C.J., remarked that the decision of this Court in *Imperatrix* v. *Lallu*—also noted above—as to the right of appeal in a case so tried (namely by jury when it ought to have been tried with the aid of assessors) in no way conflicts with the decisions of the Bombay and Calcutta High Courts that a case so tried must be treated as a valid trial by jury, so that if the Judge disagrees with the verdict, his only course is to make a reference under section 307.

With the greatest respect it may be pointed out that the decisions are inconsistent. If such a case must be distinctly treated as a trial by jury, so much so that the Judge is not entitled to regard the verdict of the jurors as their opinions as assessors, then the principle of trial by jury must apply that there is an appeal on a matter of law only.

In our opinion the mistake has arisen in supposing that the decision in *Bhootnath Dey's* case is applicable to the present law. That decision was passed under Act X of 1872, which contained

(1) (1899) 23 Bom. 696.

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no provision as to the procedure to be followed, when the accused is charged at the same trial with several offences of which some are and some not triable by jury. Then came Act X of 1882, section 269, which provided that in such a case the accused should be tried on all the charges by jury. Then came the amendment made by Act X of 1886, section 9, which is the law at present. In *Imperatrix* v. *Dev* (*supra*), Jardine, J., expressed the opinion that the amendment made by section 9 of Act X of 1886 restored the procedure of 1872, section 233, as interpreted in *Bhootnath Dey's* case.

We are unable to concur in that opinion. When *Bhootnath Dey's* case was decided in 1879, there was no provision in the law applicable to such a case, except that if an offence triable with assessors is tried by a jury, the trial shall not, on that ground merely, be invalid. The learned Judges, Mitter and Prinsep, JJ., held that the whole case must be taken as having been tried by jury. This decision was embodied in Act X of 1882, section 269, and was the law till section 269 was amended by Act X of 1886, section 9. Under the law so amended, we think that it may be taken as open both to the Sessions Judge and to the High Court in such a case, in which the opinion of each juror as an assessor has not been taken, to treat the verdict as those opinions, and to proceed to judgment, just as if the case had been tried with the aid of assessors. In such a view of the law an appeal would lie on a matter of fact. But as this view is not free from doubt, having regard to the language of section 418, and as, moreover, it is in direct conflict with the decisions above noted of the Bombay and Calcutta High Courts, we think that the question, whether an appeal in the present case lies on a matter of law only, is one which should be decided by a Full Bench; and we therefore direct that the papers of this appeal be laid before the Chief Justice.

This reference was argued before Jenkins, C.J., Candy, Fulton, Crowe and Chandavarkar, JJ.

Ráo Báhádur *V. J. Kirtikar*, Government Pleader, for the Crown:—In this case no appeal lies on matters of fact. Section 418 of the Criminal Procedure Code (Act V of 1898)—*Surja*

*Kurmi* v. *Queen Empress*.[1] The accused ought no doubt to have been tried at Ahmedabad for the offence of which he has been convicted, not by a jury but with the aid of assessors. But the irregularity does not make the trial invalid—Section 536 of the Criminal Procedure Code (Act V of 1898); *In the matter of Bhootnath Dey*[2]; *Queen Empress* v. *Jeyram*.[3]

*P. M. Mehta* (with *L. A. Shah*) for the accused.

Sections 418, 269 and 536 are the sections to be considered. Reading section 269 with section 418, it is clear that section 418 which deprives the accused of an appeal on matters of fact applies only when the offence with which he is charged is exclusively triable by jury. It does not apply where the offences charged are partly triable by jury and partly with the aid of assessors. In the Code (Act X of 1872) there was no provision similar to section 269 of the present Code. Nevertheless the ruling in the *Queen* v. *Doorga Churn*[4] shows that an appeal would lie on matters of fact where an offence which was not triable by jury was in fact tried by jury. *Queen Empress* v. *Lalbu*[5] shows that in a case like this an appeal on facts will lie—see also *Queen Empress* v. *Jeyram*.[6] Section 536 of the Code does not cure an irregularity which changes the whole character of the proceedings. We submit that the present case, though tried by a jury, ought to be taken as if tried with the aid of assessors, and thus an appeal on matters of fact will lie.

JENKINS, C.J. :—The accused was at the trial of this case charged with several offences, of which one is, and two are not, triable by jury. A jury was chosen, the trial proceeded, and at the end the Judge charged the jury, who by their verdict found the accused guilty of an offence under section 325 of the Indian Penal Code. This offence is not triable by jury. The finding and sentence of the Sessions Judge is thus recorded: "Accepting the unanimous verdict of the jury, I find the accused guilty of an offence under section 325 of the Indian Penal Code, and I sentence him to

(1) (1898) 25 Cal. 555.
(2) (1879) 4 Cal. L. R. 405.
(3) (1899) 23 Bom. 696.
(4) (1875) 24 Cal. W. R. 30.
(5) (1898) Cr. Rul. No. 15.
(6) (1899) 23 Bom. 696

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rigorous imprisonment for a period of four years and to pay a fine of one thousand rupees, &c. &c."

From this finding and sentence the accused has appealed, and the question referred for our decision is whether an appeal will lie on the facts.

I propose to confine myself to the words of the Code, though, in doing so, I will bear in mind what has been held in the several cases mentioned and discussed in the referring judgment. Section 404 of the Criminal Procedure Code provides that "no appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force," and under section 418 "an appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal will lie on a matter of law only." At the same time it is provided by section 536 that "if an offence triable with the aid of assessors is tried by a jury the trial shall not on that ground be invalid."

These sections are clear and need no paraphrase. The first question they suggest is, whether in this particular case the trial was by jury. The record leaves no doubt in my mind on this point; for the events of the trial absolutely negative the view that the accused was tried by the Court of Sessions with the aid of the jurors as assessors.

The offence therefore, though triable with the aid of assessors, was in fact tried by a jury. This irregularity did not invalidate the trial: but did it attract the consequences of section 418? This turns on the precise force in that section of the words "where the trial was by jury." Do they mean "where the trial should have been by jury" or "where the trial in fact was by jury"? In my opinion the words are themselves the clearest answer to this question: they relate to what actually occurred, not to what should have occurred. An adoption of the rival view would lead to the result that a reversal of the conditions would leave an accused, who was wrongly tried with the aid of assessors, without any right of appeal, though the scheme of the Code shows that in the view of the Legislature it is less advantageous to an accused to be tried with the aid of assessors than by a jury. I would under the

circumstances answer the reference by saying that in the present case no appeal lies on a matter of fact.

CANDY, J.:—I have but little to add to what I have said in the referring judgment. Possibly if, before final orders are passed, a Sessions Judge treats the verdict of the jurors as their opinions as assessors, and proceeds to judgment just as if the case had been tried with the aid of assessors, then it may be said that the case was not "tried by a jury," and that therefore an appeal would lie on a matter of fact.

But that is not the present case in which the Sessions Judge has recorded no judgment beyond accepting the verdict of the jurors. In such a case it seems impossible to avoid the distinct terms of section 418. Thus, as the trial was by jury, the appeal shall lie on a matter of law only. It is evident that in section 418 the Legislature deliberately used the words "the trial was by jury" instead of "offence triable by jury" as in section 536. Trial by jury is regarded as a privilege, carrying with it certain liabilities. If an offence triable by a jury is tried with the aid of assessors, then, provided objection is taken before the Court records its finding, the trial will be invalid. The accused has been deprived of a valuable privilege which it is open to him up to the last stage in the case to preserve.

But the converse is different. If the accused obtains the privilege to which, strictly speaking, he is not entitled, it is not presumed that he will take any objection. He has the chance of a verdict in his favour, a verdict which can only be upset under exceptional circumstances. If the verdict is against him, he cannot turn round and claim an appeal on matters of fact.

With reference to the mention of section 439, I would remark that the fact that an accused has obtained the privilege to which he was not strictly entitled, and has taken the chance of an adverse verdict, is no ground *per se* for the High Court exercising its power of revision under section 439. No doubt when the case is before it, the High Court can act under section 439, and in doing so will be guided, not I think by errors of procedure in the Sessions Court, which have not affected the facts of the case, but by the well-known principles according to which all the

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High Courts in this country in non-appealable cases have limited their interference with findings of fact on appreciation of the evidence.

Also I am not prepared, without further consideration, to assent to the opinion that when an appeal to the High Court on a point of law (misdirection) in a case which was tried by jury is successful, the High Court can assume the functions of a jury and find on the facts without the necessity of a re-trial.

I would answer the question referred to the Full Bench in the affirmative.

FULTON, J.:—My answer to the question whether in this case an appeal lies on a matter of law only must be in the affirmative.

On the charge in respect of which the accused has been convicted he was tried by a jury, though the offence was triable with the aid of assessors. Section 536 of the Criminal Procedure Code provides that in such circumstances the trial shall not on that ground only be invalid. There was therefore a valid trial. That trial was by jury; and according to section 418, where the trial was by jury, the appeal shall lie on a matter of law only.

Mr. Mehta urged that we should read section 418 with section 269 and treat the words "where the trial was by jury" as meaning "where the trial was by jury according to the provisions of section 269." But we cannot put this construction on section 418 without materially altering its language, which I do not think we are justified in doing. The words "where the trial was by jury" are plain enough and cannot be read as meaning where the offence was triable by jury under section 269. Moreover, this construction might be found very inconvenient in the converse case where an offence properly triable by jury was by mistake tried with the aid of assessors.

It may seem hard that a prisoner, who, if he had not been irregularly tried in the Court of Session, would have had an appeal to the High Court on the facts, should by reason of that irregularity be deprived of his appeal. But the grievance is more apparent than real. Under section 439 the High Court has the widest powers of revision, and, if it finds that owing to an irregularity in the Court below the prisoner is in danger of being

wronged, it will, I think, exercise those powers even to the extent of considering the correctness of the verdict, just as, sometimes in proper cases, it reviews Magisterial decisions which are not open to appeal.

It may be argued that this view enables an accused person to secure the effect of an appeal in cases in which by law no appeal is allowed. But a similar objection may be urged in almost every case in which the revisional powers of the High Court are used, for it is only when there is no appeal that the necessity ever arises for the exercise of such powers. The Court, no doubt, always keeps in view the finality intended by the law, and only interferes when it is satisfied that a miscarriage of justice will result if revision is refused. But at the same time, whilst it recognizes that finality in certain cases is intended, it has also to bear in mind that the Legislature has conferred on it powers of revision, which it is intended to exercise where wrong will otherwise pass unredressed. No general rule can be laid down determining the cases in which the Court ought to exercise these powers. No such rule has been prescribed by the Legislature, and no opinion of this Court can supplement or take away from the provisions of the law. In the present case it seems to me that it is entirely for the learned Judges of the Division Bench to determine in their discretion whether they will go into the facts or not.

I have not thought it necessary to discuss the various decisions so fully set forth in the reference of my learned colleagues. But I wish to point out that although the opinion that in a case like the present no appeal lies may be at variance with some of the *dicta* in *Imp.* v. *Lalbu*,[1] it is in no way inconsistent with the result, for in that case there had been a clear misdirection to the jury which in itself was sufficient to give ground for appeal.

CROWE, J.:—The accused was charged before the Sessions Court at Ahmedabad with an offence under section 302 of the Indian Penal Code triable by jury. During the trial other charges were added under sections 304 and 325, of offences which are not triable by jury at Ahmedabad.

(1) Cr. R. 15 for 1898.

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The law provides—section 269, clause 3, Criminal Procedure Code—that in a mixed trial where some of the offences charged are triable by jury and some are not, the accused should be tried by jury for such offences as are triable by jury and by the Court of Sessions with the aid of the jurors as assessors for such of them as are not triable by jury. This course was not followed by the Sessions Judge. His summing up had reference to all the offences with which the accused was charged, and at the conclusion of the trial the jury returned a unanimous verdict that the accused was guilty of an offence under section 325 of the Indian Penal Code. This verdict was accepted by the Sessions Judge, who forthwith found the accused guilty and sentenced him accordingly. The question which now arises and which has been referred for decision to a Full Bench, is whether the accused has a right to appeal on the facts. Section 418 of the Criminal Procedure Code provides that when the trial was by jury an appeal shall lie on a matter of law only. In the present case it seems impossible to hold that the trial was not by jury. The jurors were chosen by lot, the verdict of the majority (in this case it was unanimous) was given by the foreman, and was accepted and acted on by the Sessions Judge. In no respect was the procedure prescribed by law for the trial of cases with the aid of assessors followed. Assessors were not chosen, nor were they required each to state his opinion orally, nor did the Sessions Judge pronounce judgment according to the provisions of section 367 of the Criminal Precedure Code. Section 536 of the Criminal Procedure Code was apparently designed to meet the actual circumstances of cases like the present, and it lays down that if an offence triable with the aid of assessors is tried by a jury the trial shall not on that ground only be invalid.

The trial being a valid trial by jury, the provisions of section 418, if that section is read in its natural and ordinary sense, are a bar to an appeal on matters of fact.

The question arises whether the accused has been prejudiced by the procedure followed by the Sessions Judge. I think clearly not. He has had the advantage of the opinion of the jury on all matters of fact, by which the judge is bound. It seems clear from the wording of section 536 that that is the view entertained by

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the Legislature, because although a trial is not invalid on the mere ground that an offence triable with the aid of assessors is tried by a jury, in the converse case when the offender is entitled to be tried by a jury and has been tried with the aid of assessors, the trial on that ground alone may be declared invalid, if the objection be taken before the Court records its finding, the law apparently holding that the accused has been deprived of a right or privilege by an error of procedure.

For these reasons I am of opinion that in the case stated no appeal lies.

CHANDAVARKAR, J.:—I venture to think that there is an apparent deficiency in the language used by the Legislature in section 536 of the Code of Criminal Procedure, and whether we construe it singly or along with section 418, it is as open to the construction for which Mr. Mehta contended as that pressed on us by the learned Government Pleader. The negative form of the language used in section 536 lends some support to the contention that where an accused person, who ought to have been tried with the aid of assessors, is tried by a jury, the Legislature says merely that the trial shall not on that ground only be invalid, *i.e.* the trial shall not be treated as a nullity, not that it shall be treated for all purposes as a valid jury trial. The wording of section 418 is also, in my view, not altogether precise. It is also capable of more than one meaning. No doubt that section says that where an accused person "was tried by jury," an appeal shall lie on a matter of law only. But the words "was tried" may be construed to mean "where an accused person was, according to law, tried by a jury," as much as they may be taken to mean "where as a matter of fact, whether according to law or not, an accused person was tried by a jury." Where the language used by the Legislature is capable of more than one construction, I should lean in favour of that which is beneficial to the accused. If the result of the construction which the learned Government Pleader has asked us to put upon these sections were simply to deprive the accused of the right of appeal he would have had on facts, had he been, as he ought to have been, tried with the aid of assessors, I should have held that more clear and positive

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language was necessary in the sections of the Code to justify that construction as the only one possible and to impute to the Legislature the intention to deprive the accused of that right. But it is not a case where the accused is simply deprived of the right of appeal on facts given to him by the Code. It is rather a case where he loses one right and gains another instead. If, as a result of being tried by a jury, when he ought to have been tried with the aid of assessors, his right of appeal on facts ceases, he at the same time secures the privilege of a trial by jury, and the whole scheme of the Code of Criminal Procedure is to treat trial by jury as a privilege, as valuable as, if not more valuable than, the other rights. This is rendered even more clear by the distinction which is made by the Legislature in section 536 between a case where an accused person who ought to have been tried with the aid of assessors is tried by a jury, and a case where an accused person who ought to have been tried by a jury is tried with the aid of assessors. In the former case the Legislature says that the trial shall not be invalid; whereas in the latter the trial shall not be invalid unless objection is taken to the trial before the Court records its finding. It is obvious that in the former case the accused gets a privilege, whereas in the latter the accused has given to him the option of waiving the privilege he has. These considerations make the intention of the Legislature clear in spite of the apparent deficiency of the language used. I would therefore answer the question referred to us in the affirmative.

## APPELLATE CRIMINAL.

*Before Mr. Justice Candy and Mr. Justice Fulton.*

1901.
*April* 18.

KING-EMPEROR *v.* JAYRAM.*

*Criminal Procedure Code (Act V of 1898), sections 284, 285 and 537—Trial with assessors—Trial with the aid of one assessor only—Legality of such trial—Assessors.*

In a case triable by a Court of Session with the aid of assessors, one of the assessors being ill, the trial commenced and ended with only one assessor.

* Criminal Appeals Nos. 88 and 89 of 1901.

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*Held*, that there was no legal trial, that the proceedings must be set aside and a new trial directed.

Section 537 of the Criminal Procedure Code (Act V of 1898) had no application to such a case, as the Court was not properly constituted.

APPEALS from the convictions and sentences recorded by E. M. Pratt, Sessions Judge of Sholápur-Bijápur.

The accused, Jayram and Sakhya (with seven others), were tried on a charge of dacoity under section 395 of the Indian Penal Code (XLV of 1860) before the Sessions Judge with the aid of assessors.

As one of the assessors was ill, the trial commenced and ended with one assessor only.

The Sessions Judge gave the following reasons for this procedure:

"The panel of the assessors is a very small one, and it is very difficult to secure their attendance. The procedure adopted is perhaps not warranted by the terms of sections 284 and 285 of the Criminal Procedure Code, but it saved the delay and expense of an adjournment and was not objected to."

The Sessions Judge disagreeing with the assessor convicted two of the accused, Jayram and Sakhya, of the offence charged and sentenced them each to one year's rigorous imprisonment. The other accused were acquitted.

Thereupon Jayram and Sakhya preferred two separate appeals to the High Court.

*R. W. Desai* for the Crown:—No doubt the trial commenced with only one assessor. This was irregular and opposed to the rulings in *Queen-Empress* v. *Bastiano*[1] and *Queen-Empress* v. *Babu Lal*.[2] But in this case section 537 cures the irregularity, especially as the accused were represented by pleaders who could have objected to the course followed by the Judge, but did not. The irregularity was acquiesced in by the accused, as it did not prejudice them in their defence.

There was no appearance for the accused.

CANDY, J.:—As the Sessions Judge reports that the trial

(1) (1890) 15 Bom. 514. (2) (1898) 21 All. 106.

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commenced with only one assessor, we must hold that there was no legal trial (sections 284, 285, Criminal Procedure Code). See the cases of *Queen-Empress* v. *Bastiano*(1) and *Queen-Empress* v. *Babu Lal*.(2) The error is one which vitiates the proceedings. The Government Pleader drew our attention to section 537, Criminal Procedure Code, but in our opinion the provisions of that section are not applicable to this case in which the Court of Sessions was not properly constituted and thus there was no legal trial.

We must set aside the proceedings and direct a trial before a properly constituted Court.

As the Sessions Judge of Sholápur has already expressed an opinion on the merits of the case, we direct that the case be transferred to the Court of Sessions at Bijápur.

*Re-trial ordered.*

(1) (1899) 15 Bom. 514. (2) (1898) 21 All. 106.

## APPELLATE CIVIL.

*Before Mr. Justice Candy, Mr. Justice Fulton and Mr. Justice Chandavarkar.*

1901, *April* 18.

SAMARATMAL UTTAMCHAND, PLAINTIFF, *v.* GOVIND AND ANOTHER, DEFENDANTS.*

*Stamp—Indian Stamp Act (II of 1899), schedule I, article 5 (b)—Agreements to deliver goods in exchange for goods—Price.*

Agreements or memoranda of agreements to deliver goods in exchange for goods are not agreements of sale under article 5, schedule I, of the Indian Stamp Act (II of 1899), and are liable to stamp duty of eight annas each as agreements "not otherwise provided for."

REFERENCE by Ráo Sáheb S. S. Wagle, Subordinate Judge of Bhadgaum in the Khándesh District, under section 60 of the Indian Stamp Act (II of 1899) in a Small Cause suit.

The reference was made in the following terms:

This suit has been brought by the plaintiff on two entries in his book which may be translated as follows:

* Civil Reference No. 1 of 1901.

"Account (of) Govinda valad Lakshman Patil and Bhika valad Govinda Patil, inhabitants of Neri, cyclical year 1822, Vaishakha Shudha 2.

| *Credit.* | *Rupees.* | *Debit.* | *Rupees.* |
|---|---|---|---|
| No. I. | | 2 maunds 5 shers. | |
| | | Date, cyclical year 1822. Vaishakha Shuda 2 (1st May 1900). Cotton seeds 1 *palla* in lieu of this. | |
| | | 2 maunds 5 shers of cotton have agreed to be given: the *dhadi* (weight) to be of 23 shers: cotton seeds have been received: cotton remains to be given: we shall give (the cotton) of the first picking: in the handwriting of Sakharam Ravji. | |
| | | 1. Signature (of) Govinda Lakshman Patil. | |
| | | 1. Signature (of) Bhika Govinda Patil. | |
| No. II. | | 1 maund 2½ shers. | |
| | | Date, cyclical year 1822, Jeshta Vad 9 (21st June 1900). On (this day) cotton seeds, half a *palla* in lieu of that, 1 maund 2½ shers of cotton has been agreed to be given: we shall give the cotton by a *dhadi* (weight) of 23 shers: we have received the cotton seeds: cotton remains to be given: we shall give the cotton of the first picking: in the handwriting of Rajaram Vithoba Set Wani. | |
| | | 1. Signature (of) Govinda valad Lakshman. | |
| | | 1. Signature (of) Bhika valad Govinda." | |

The questions referred for the opinion of the Honourable High Court are,—

1. What is the nature of the above instruments Nos. I and II?
2. What stamp do they require?

My opinion is that the instruments in question are agreements or memoranda of agreements to give cotton in exchange for cotton seeds received and require a stamp of 8 annas each.

My reasons are as follows:

1. The instruments in question are governed by the present Stamp Act II of 1899. It has been contended by plaintiff's pleader that they are agreements for or relating to the sale of goods or merchandise and as such are exempt from stamp duty under schedule I, article No. 5. I cannot yield to this contention. "Sale" is defined in the Contract Act (section 77) as "the exchange of property for a price." In the instruments under consideration cotton is agreed to be given in exchange for cotton seeds received, not in exchange for a price. The transactions evidenced by the instruments Nos. I and II are therefore legally not sales: and the instruments are not agreements or memoranda of agreements for or relating to the sale of goods or merchandise. They are merely agreements or memoranda of agreements to deliver cotton in exchange for cotton seeds received.

2. If this view is correct, the instruments in question cannot be exempted

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from stamp duty. They are chargeable with a stamp duty of 8 annas each under schedule I, article No. 5 (*b*), as being agreements or memoranda of agreements "not otherwise provided for."

The questions, however, are not free from doubt and demand an authoritative adjudication. They are of general importance, as instruments like those which form the subject of this reference are of frequent occurrence in this district.

There was no appearance for Government or for the parties.

CHANDAVARKAR, J.:—We think the Subordinate Judge's view is correct. Though the word "price" is capable of being understood either as money or any other recompense in value, it is clear from the illustrations to section 78 of the Contract Act that it is used there in the former sense. In regard to the sale of goods "the price must consist of *money* paid or promised." (Benjamin on Sale, 4th Edition, pages 2 and 89.) "The difference between a *sale* and an *exchange* is this, that in the former the price is paid in money, whilst in the latter it is paid in *goods* by way of barter." (Chitty on Contracts, 12th Edition, page 430.) This distinction has been observed by the Legislature in this country, as will appear on a reference to section 118 relating to exchange and the sections relating to sales in the Transfer of Property Act. The Subordinate Judge's view is also supported by the decisions of the Madras High Court in *Queen Empress* v. *Appavu*[1] and in *Volkart Brothers* v. *Vettivelu*.[2]

*Order accordingly.*

(1) (1885) 9 Mad. 141.

(2) (1887-88) 11 Mad. 459, 467.

# APPELLATE CIVIL.

*Before Sir L. H. Jenkins and Mr. Justice Chandavarkar.*

VISHWANATH RAMKRISHNA AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* VASUDEV LAKSHMAN AND OTHERS), ORIGINAL DEFENDANTS), RESPONDENTS.* 1901. *June* 10.

*Appeal—Joint appellants—Presentation of appeal beyond time—Affidavit excusing delay in appealing made by only one of appellants stating reasons personal to himself—Appeal admitted—Variation of decree on a point affecting other appellants but not the appellant who made the affidavit —Variation not allowed—Civil Procedure Code (XIV of 1882), section 544—Limitation Act (XV of 1877) section 5—Practice.*

In a partition suit a decree was passed against twenty-four defendants whose interests in the subject-matter of the suit were not identical. Part of the property in suit consisted of a kulkarni vatan, one-third share of which (*inter alia*) was given by the decree to the plaintiffs. Eleven of the defendants appealed against the decree, of whom only six (defendants 1 to 6) had an interest in the kulkarni vatan. The decree was passed on the 11th April, 1898, and the appeal was not presented until the 7th June, 1898, *i.e.* beyond the period (thirty days) allowed by the Limitation Act (XV of 1877). The only affidavit excusing the delay was made by defendant 14, who was not interested in the kulkarni vatan, and it stated reasons for the delay which were personal to himself, and did not apply to the other appellants. On this affidavit, however, the appeal was admitted, and the lower appellate Court modified the decree and reduced the one-third share of the kulkarni vatan given to the plaintiffs to a one-sixth share. The plaintiffs thereupon appealed to the High Court.

*Held* (reversing the decree of the lower appellate Court and restoring that of the first Court) that the appellate Court erred in altering the share of the kulkarni vatan. Defendant 14 had no interest in the variation of the decree, having no interest in the kulkarni vatan, and section 544 of the Civil Procedure Code (XIV of 1882) did not apply. The variation was only in favour of defendants 1 to 6, who alone were interested in the vatans. They, however, had not excused their delay in presenting the appeal and it was barred by limitation.

SECOND appeal from the decision of M. P. Khareghat, District Judge of Ratnágiri, modifying the decree of Ráo Sáheb S. V. Joshi, Subordinate Judge of Rájápur.

The plaintiffs sued to recover by partition possession of one-sixth share of the lands and houses and one-third share of the kulkarni vatan in suit with damages and mesne profits.

* Second Appeal 539 of 1900.

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The defendants, who were twenty-four in number and whose interests in the properties in suit were not identical, raised various contentions which are not material for the purpose of this report.

The Subordinate Judge on the 6th April, 1898, passed a decree awarding to the plaintiffs one-sixth share in the lands in dispute and one-third share in the kulkarni vatan.

Against the said decree eleven of the defendants, viz. defendants 1 to 6 and defendants 12 to 16 presented an appeal to the Judge on the 7th June, 1898. As abovementioned the appellants had not identical interests, *e.g.* only some of them, viz. defendants 1 to 6, were concerned with the question of the kulkarni vatan. More than the statutory period allowed for an appeal (thirty days from the date of the decree) had then expired, and it was therefore necessary to account for the delay in order to get the appeal admitted (section 5 of the Limitation Act, XV of 1877). One of the appellants (defendant 14) who had no interest in the kulkarni vatan made an affidavit on the 20th June, 1898, in which he set forth the reasons for not presenting the appeal in time. The reasons so given only affected himself and explained his own default. They did not explain the default of the other appellants. The following was the affidavit:

After arguments in Suit No. 484 of 1893 of the Rájápur Court file, the case was pending disposal and it was disposed of on the 6th April, 1898. But although I was present in Court that day till 5 o'clock (P.M.), the case was not disposed of during that time. After that I left under the impression that the case would be disposed of after the vacation. Seven or eight days after, when I came to know that the case was disposed of, I went to Rájápur about the 13th of April, 1898, and applied for copies of the minutes and decree (judgment), and along with the application paid Rs. 6 for expenses (*i.e.* copying charges). I could not know what particular amount it was necessary for me to pay. On the 25th of May, 1898, when I went to Rájápur Court to receive copies, I learnt that my application for copies was disposed of (*i.e.* rejected) on the ground that the amount paid by me along with the said application was not sufficient to defray copying charges. The amount paid by me was returned to me on that day. Afterwards I got Mr. Narayan Babaji Marathe, pleader for my other kinsmen and co-appellants in this case, to present an application for copies of minutes and decree (judgment) on the 25th of May, 1898. The said copies were ready on the 31st of May, 1898. I received them from the said pleader on the 4th of June, 1898. Then leaving that place I came to Ratnágiri on the 6th of June, 1898, and gave the said copies to a pleader, Mr. Narayan Mahadev Madrekar, for making an appeal. Rájápur is twenty miles from my village Gaonkhadi, and

Ratnágiri is thirteen miles from Gaonkhadi. I have duly made this affidavit in writing. Dated 20th June, 1898.

The Judge forwarded this affidavit to the Subordinate Judge for a report, and after receipt of the report, provisionally excused the delay in the presentation of the appeal. On hearing the appeal on the merits, the Judge modified the decree of the Subordinate Judge by awarding to the plaintiffs one-sixth share in the kulkarni vatan instead of one-third share granted by the Subordinate Judge.

The plaintiffs preferred a second appeal.

*H. C. Coyaji* for the appellants (plaintiffs) :—The appeal by the defendants to the lower appellate Court was time-barred. It was the affidavit of defendant 14, which was taken to excuse the delay and procured the admission of the appeal and it was he who applied for the admission of the appeal. The other defendants made no affidavit and their default is not explained or excused. Nevertheless it is they who have benefited by the appeal. They alone were interested in the kulkarni vatan. Defendant 14 was not interested in it at all. The appeal was admitted in his affidavit stating reasons for the delay which were personal to himself and which did not affect the other appellants. We therefore contend that there were no sufficient grounds to excuse the delay in appealing with respect to the appellants other than the applicant—*Bai Ful* v. *Desai Manorbhai*,(1) *Moti Chand* v. *Ful Chand*.(2)

*N. M. Samarth* for respondents 1 to 3 (defendants 1 to 3) :—The appeal was a joint appeal and the application for its admission, though made by one of the appellants, must be considered to be a joint application. The application to excuse the delay and to admit the appeal was not made by the applicant only for himself. It was made for all the appellants. The Judge asked for a report of the Subordinate Judge, and having considered that report, he came to the conclusion that there were sufficient grounds to excuse the delay. We submit that the Judge properly exercised his discretion in granting the application and in admitting the appeal.

(1) (1897) 22 Bom. 849. (2) (1898) 27 Cal. 57.

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*Balaji A. Bhagavat* for respondent 10 (defendant 12).

JENKINS, C.J. :—The question for our consideration is whether the lower appellate Court was entitled to vary the decree of the first Court and reduce the one-third share in a kulkarni vatan awarded to the present appellants by that decree to a one-sixth share. The appeal to the lower appellate Court was presented beyond time, but of the several appellants one only, (defendant 14,) applied to have the delay excused. This he did on grounds personal to himself, and the result was that the appeal of all the appealing defendants was admitted and the decree of the first Court was varied in the way indicated. In this variation defendant No. 14 had no interest, and as the case clearly does not fall within section 544 of the Code of Civil Procedure, the District Judge erred in disturbing the shares in the kulkarni vatan, for there was no ground on which the delay of the appellants, defendants 1 to 6 (who alone were concerned in this question), could be excused.

The decree of the lower appellate Court must therefore be reversed except as to costs and that of the Subordinate Judge restored: the appellants' costs of this appeal to be borne by respondents 1 and 3.

*Decree reversed.*

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## CRIMINAL REVISION.

*Before Mr. Justice Candy and Mr. Justice Chandavarkar.*

*IN RE* MATHUR LALBHAI.*

1901.
*June* 10.

*Criminal Procedure Code (Act V of 1898), sec. 517—Disposal of stolen property on conviction of the thief—Babashahi coin—Legal tender—Customary coin.*

A witness for the prosecution in a case of theft produced a sum of money in Babashahi (Baroda) coin (part of the stolen property) which the accused had paid to him in satisfaction of a debt. The accused was convicted, and at the close of the trial the Court, under section 517 of the Criminal Procedure Code

* Criminal application of revision No. 41 of 1901.

(Act V of 1898), ordered the money to be restored to the complainant from whom it had been stolen.

*Held*, that the order was right. The stolen coins were not current coin of the realm and was neither by Statute nor by the law of merchants in British India a legal tender. The property in them did not therefore pass by mere delivery, but remained in the complainant.

*Collector of Salem*[1] and *Empress* v. *Joggessur Mochi*[2] distinguished.

THIS was an application for revision under section 520 of the Code of Criminal Procedure (Act V of 1898).

The applicant was a witness for the prosecution in the case of *Queen-Empress* v. *Parbhudas Javerdas*, tried by the Additional Session Judge at Ahmedabad. The accused in that case had stolen a large sum of money from the complainant consisting of Babashai (Baroda) coin and had used it in paying his creditors, of whom the applicant was one.

At the trial the applicant produced a sum of Rs. 2,555 in Babashai (Baroda) coin which the accused had paid him.

The accused was convicted, and at the close of the trial the Judge ordered the stolen money which had been produced by the witnesses to be restored to the complainant from whom it had been stolen. He said:

A difficulty has been suggested as to the disposal of the money contained in the bag, Exhibit N-1. All of it, it will be noted, was money recovered from the creditors of the accused. My finding amounts to holding that it formed part of the proceeds of theft. There is not, it is true, and there cannot be, evidence that it was the identical money stolen and distributed by the accused. But under the terms of the explanation to the amended section 517, Criminal Procedure Code, it seems to me that the Court is empowered to order its restoration to the complainant.

The property, including the sum of money produced by the applicant, was accordingly handed over to the complainant.

The applicant applied to the High Court under section 520 of the Criminal Procedure Code (Act V of 1898) to set aside the order passed by the Sessions Judge for the restoration of the property to the complainant and praying that the Rs. 2,555 might be returned to him.

(1) (1873) 7 Mad H. C. Rep. 233. (2) (1878) 3 Cal. 379.

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Notices were issued to the District Magistrate and the complainant calling upon them to show cause against the application.

Ráo Bahádur *Vasudeo J. Kirtikar*, Government Pleader, for the Crown, showed cause:—The money produced before the Court is found to be the identical money stolen by the accused. The lower Court had therefore jurisdiction to deal with the property.

*R. V. Desai* for the complainant showed cause:—The order of the lower Court is right. The complainant from whom the coins were stolen is still the owner and is entitled to them. The fact that they were paid over by the thief to the applicant does not make the applicant the owner. The cases of *Collector of Salem*(1) and *Empress* v. *Joggessur Mochi*(2) do not apply. These were cases in which stolen currency notes were paid away by the thief. Currency notes are legal tender and must be accepted as payment by the payee and the property in them passes by mere delivery. But Babashai (Baroda) coins are not legal tender, and therefore the property in them did not pass by mere delivery.

*L. A. Shah* for the applicant:—Assuming that the money produced is part of the stolen property, the applicant became the owner on his accepting it from the accused in satisfaction of his debt. The ownership in cash is transferred by mere delivery, even if it be stolen property. We rely upon *Collector of Salem*(3) and *Empress* v. *Joggessur Mochi*.(4) These cases no doubt deal with the case of a currency note; but the *ratio decidendi* applies to the present case. The amended section 517 does not empower the Court to deal with such property.

CHANDAVARKAR, J.:—This is an application by Mathur Lallubhai asking us to revise the order passed by the Additional Sessions Judge of Ahmedabad on the conviction of the accused in Sessions case No. 218 of 1900, directing, under section 517 of the Criminal Procedure Code, that the amount of Rs. 2,355 in Babashai

(1) (1873) 7 Mad. H. C. 233.
(2) (1878) 3 Cal. 379.
(3) (1873) 7 Mad H. C. 233.
(4) (1878) 3 Cal. 379.

(Baroda) coin produced by the applicant before the Police and brought into Court subsequently as part of the stolen property in that case, should be returned to its original owner, from whom it had been stolen.

It is contended before us in support of the application, on the authority of the cases of *Collector of Salem*[1] and *Empress* v. *Joggessur Mochi*[2] that the property in dispute, which consists of *Babashai* rupees, being money, the title to it passed to the applicant by mere delivery as soon as he received it *bona fide* in satisfaction of a legal debt due to him. Those rulings have been followed by the Panjab Chief Court in two cases—*Kanshi Ram* v. *Secretary of State for India*[3]; *Mathra Dass* v. *Ramanand*,[4] and must be accepted as good law. But the principle of the rulings in question is that a currency note, like money which is current coin of the realm, is a *legal tender*, and a person receiving it acquires a perfectly valid title to it. But money, to come within the rule, should be *current* coin. "There are no doubt cases in which money cannot be recovered by the rightful owner from a person who has obtained possession of it. This is one of the incidents attaching to a payment of current coin" (Per Cave, J. in *Ex parte Wolverhampton Banking Co. In re Campbell*[5]). That rule, however, cannot apply where the money passing from one hand into another is not current coin of the realm and is neither by statute nor by the law of merchants in British India shown to be a legal tender or, (to use the language of the Editors of Smith's Leading Cases in their notes to *Miller* v. *Race*), "accustomably transferable in the country in the same manner as *cash*." In the language of Fry, L.J., in *Picker* v. *London and County Banking Co.*,[6] a question such as the one which arises in this case must be determined with reference to the law and custom prevailing where it arises, for, if it were otherwise, "if it were proved that cowrees are part of the currency of Africa, they must be treated as money in this country, though there were no custom here to treat them as money."

(1) (1873) 7 Mad. H. C. 233.
(2) (1878) 3 Cal. 379.
(3) (1890) 25 P. R. No. 83. p. 259.
(4) (1878) 13 P. R. No. 73. p. 235.
(5) (1884) 14 Q. B. D. 32 at p. 36.
(6) (1887) 18 Q. B. D. 515. p. 520.

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We must look to the law and custom of British India to determine the question. That law does not make *Babashai* coin a legal tender, and therefore the title to it cannot pass by mere delivery. As to custom, there is no suggestion or proof of it in this proceeding. If there is any custom, it may be set up, if the parties choose, in a civil proceeding. But on the present application we do not think we can interfere with the discretion exercised by the Sessions Judge under section 517 of the Criminal Procedure Code. We reject the application.

*Application rejected.*

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## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.*

1901. *June* 14.

NATIONAL BANK OF INDIA, LIMITED, PLAINTIFF, *v.* SALEH MAHAMED BALAXA, DEFENDANT.*

*Letter of credit—Bill of exchange—Meaning of the word "honoured" in reference to a bill of exchange—Right of acceptor of bill to shipping documents.*

It is in accordance with ordinary mercantile usage for a party presenting a bill for acceptance to deliver to the acceptor at the time of acceptance the shipping documents relating to the goods in respect of which the bill is drawn.

The primary purpose of a letter of credit is to secure an obligation to accept the bills or drafts drawn under it. An acceptance of itself imposes an obligation to pay.

Where a letter of credit stipulates for security, the purpose is to obtain that security at acceptance, for it is then that the acceptor's liability on the draft arises.

A letter of credit addressed by the firm of S. R. & Co. to the defendant stated that his drafts to the extent of £4,000 would be "duly honoured by us against delivery of shipping documents and invoices." A bill was drawn by the defendant upon the firm against this credit and was sold and handed over by him to the Bank, together with shipping documents relating to a consignment of goods made by him in respect of which the bill was drawn. The Bank presented the bill to S. R. & Co., by whom it was duly accepted, and the Bank thereupon handed over the shipping documents to S. R. & Co. When the bill

* Civil Reference No. 2 of 1901.

became due, the acceptors (S. R. & Co.) did not pay, and the Bank then sued the defendant (the drawer). The defendant contended that in the letter of credit the word "honoured" meant "paid," and that the Bank should not have handed over the shipping documents to S. R. & Co. until the bill was paid.

*Held*, that it was in accordance with ordinary mercantile usage to hand over the shipping documents to the acceptor at the time of acceptance, and that there was nothing in the letter of credit to prevent the Bank from acting in accordance with that usage. The word "honoured" in the letter of credit meant "honoured by acceptance."

*In re Agra and Masterman's Bank*(1) referred to.

REFERENCE by Major H. M. Abud, Political Agent at Aden, under section 8 of Act II of 1864.

Messrs. Schmorl Rischmann & Co. of London gave the defendant, Saleh Mahomed Balaxa, a letter of credit against which he was to draw bills at ninety days' sight. The letter was as follows:

*21, Old Broad Street, London, E.C., 18th May 1900.*

TO SHEIKH SALEH BIN MAHOMED BALAXA, Aden.

Dear Sir,—We beg to inform you that Messrs. T. Schmorl and Co. of this place have opened with us a credit in your favour of £4,000, say four thousand pounds sterling, to be used in your drafts on us at ninety days' sight against your shipments of hides and skins &c. from Aden to London and to New York, U. S. or Atlantic ports, which drafts will be duly honoured by us to the debit of the said friends against delivery of shipping documents and invoices to be countersigned by Mr. C. A. Brenchley, Messrs. T. Schmorl and Co.'s representative in Aden.

Insurance will be covered by Messrs. Schmorl and timely notice to be given.

We are &c. &c.,

(Signed) SCHMORL RISCHMANN & Co.

It appeared that the defendant had on three occasions drawn against this credit and sold his bills to the National Bank at Aden.

On the 10th September, 1900, he consigned certain bales of skins to London by the steam ship "Egypt" and he drew against the above credit on Messrs. Schmorl Rischmann and Co. a bill for £633-7-0, which he sold to the said Bank at Aden. The bill was handed to the Bank, together with the invoice and bill of lading of the said consignment.

(1) (1867) L. R. 2 Ch. 391.

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The bill was afterwards duly presented by the Bank to Messrs. Schmorl Rischmann and Co. and was accepted by them, they at the same time receiving from the Bank the invoice and bill of lading for the said consignment.

When the bill became due it was not paid by Messrs. Schmorl Rischmann and Co., but was returned by them to the Bank with the endorsement "Refer to drawer".

The bill was then sent back to the Bank at Aden. The Bank there applied to the defendant (the drawer) for payment, but without success. The Bank then brought this suit against him in the Court of the Resident at Aden.

The defendant contended that he was not liable, because the Bank had parted with the shipping documents before being paid the amount of the bill, and by so doing had acted in violation of the letter of credit under which the bill was drawn. He alleged that he had handed these documents to the Bank as security, and that they ought not to have parted with them before payment, and that having parted with the security without receiving payment, the loss should fall on them and not on him.

The Resident at Aden referred the case to the High Court under section 8 of Act II of 1864. In his reference he said:

> Both parties admit that the draft was drawn under the terms of the letter of credit of the 18th May, 1900, on which, however, they place a different construction, and it is therefore the issue to be tried. Neither party have produced any evidence as to the customary manner in which the former transactions under the same letter of credit have been dealt with. The Manager of the Bank merely states that in the former transactions the documents were handed over on the mere acceptance of the drafts by Messrs. Schmorl Rischmann and Co. of London. The defendant disclaims all knowledge of how the former drafts were dealt with, but he avers that the terms of the letter of credit only permit of the delivery of the documents after payment of the drafts.
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> The pith of the matter is contained in the following words of the letter of credit, viz. "which draft will be duly honoured by us to the debit of the said friends against delivery of shipping documents and invoices to be countersigned by Mr. C. A. Brenchley, Messrs. T. Schmorl and Co.'s representative in Aden." The question would seem to me to hinge on the interpretation of the word "honoured." Can a bill be said to be effectually honoured when it is accepted, and subsequently on presentation for payment it is referred to drawer, *i.e.* dishonoured? There is nothing, I think, in the letter of credit to show whether the honouring of the draft and delivery of documents was to be on acceptance of the draft or on its being honoured by payment at due date. The defendant

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alleges that the meaning of the letter of credit is that the documents were to be handed over on payment of the draft and not before, and he further avers that he handed over the documents to the Bank as security, as without them the bank would not have bought his draft. The plain argument of which is, that the Bank had security for the draft and that if they parted with that security without receiving the value, the loss would not fall on him but on them.

From section 99 of Act XXVI of 1881 it would appear that a draft can be dishonoured in two ways, that is to say, either by non-acceptance or non-payment. In this case the draft was honoured by acceptance, but dishonoured by non-payment. On the acceptance of the draft, the Bank apparently handed over to the drawee and acceptor the shipping documents. No evidence of the intention of the parties, except the contradictory allegations of the parties, has been produced, and I am therefore of opinion that the plaintiff should be non-suited with costs for failure to prove his claim, and because I can hardly believe that the term "honour" in the letter of credit does not mean the final act of payment, as, if it did not, drawer would have parted with his goods and his money too, which hardly seems to be equitable, while the plaintiff who held the shipping documents actually parted with them without taking sufficient care that the draft would be met at maturity by the drawee and acceptor. Had the Bank bought the draft without consideration, there would be no doubt but that the drawer is liable, but as consideration and security they obtained the shipping documents, and if these documents were not security I can conceive of no useful purpose being served by their taking them at all.

*Scott* (Acting Advocate General) with *Little and Company* for plaintiff:—We have not lost our right against the defendant because we handed over the shipping documents to the acceptors when they accepted the bill. They were entitled then to get those documents—*Gilbert* v. *Guignon*[1]; *Ranken* v. *Alfaro*[2]; *Shepherd* v. *Harrison*.[3] The words in the letter of credit do not require the Bank to adopt any other practice. The word "honoured" in the letter of credit does not mean "paid". It means "accepted," and the Bank was justified in handing over the documents when the bill was "honoured" by being accepted—Negotiable Instruments Act (XXVI of 1881), section 91.

*Jardine* (with *Craigie, Lynch and Owen*) for defendant:—The liability of the defendant depends on the construction of the letter of credit. We contend that the word "honoured" in that

(1) (1872) L. R. 8 Ch. 16 at p. 20. (2) (1876-77) 5Ch. D. 786.
(3) (1871) L. R. 5 H. L. 116.

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letter means "paid," and that the Bank was not justified in handing over the shipping documents until the bill was honoured by payment.

JENKINS, C.J.:—This is a reference to the High Court under the Aden Courts Act (Act II of 1864) and though the provisions of section 8 have not been strictly observed, we think the point for our opinion is sufficiently indicated to enable us to dispose of the case without returning it for amendment.

The plaintiff Bank, as the payee, has sued the defendant as the drawer of a bill not paid by the acceptor at maturity. The defendant contends that he is exonerated, because the Bank parted with certain shipping documents given to it with the bill, and by so doing acted in contravention of the terms of a letter of credit, under which the bill was drawn.

Now, apart from the letter of credit, it is clear that the plaintiff was acting in accordance with ordinary mercantile usage in delivering the shipping documents to the acceptor of the bill on acceptance, so that we have to see whether there is anything in the letter of credit that forbids the Banks so acting, and imposes on such conduct the penalty of the loss of all remedies against the drawer. It appeared to the learned Judge that this was the legal result of the following words in the letter of credit, viz. "which draft will be duly honoured by us to the debit of the said friends against delivery of shipping documents and invoices." "Honoured," he thought, must mean *paid*, and therefore he held the letter of credit forbade the delivery of shipping documents before payment. The *ratio decidendi* is thus expressed by the learned Judge: "I can hardly believe that the term 'honour' in the letter of credit does not mean the final act of payment, as, if it did not, the drawer would have parted with his goods and his money too, which hardly seems to be equitable, while the plaintiff who held the shipping documents actually parted with them without taking sufficient care that the draft would be met at maturity by the drawee and acceptor."

We do not agree with this view. In the first place the primary purpose of a letter of credit is to secure an obligation to accept the bill or draft; for when there is an acceptance, *that* itself

imposes an obligation to pay without any stipulation to that effect in the letter of credit. If in the letter now under consideration "honoured" means "paid" only, then there is no express stipulation for acceptance. Again, in a letter of credit stipulating for security the purpose is to obtain that security at acceptance; for it is then that the acceptor's liability on the draft arises, and, if he does not then obtain his security, he may find, when the time for payment comes, that it is non-existent.

For these reasons we think the word in this letter of credit refers to honour by acceptance. We should have come to this conclusion apart from authority, but we find the same view taken by Lord Cairns of a letter of credit in much the same terms—*In re Agra and Masterman's Bank.*(1) The words of the letter of credit there were, "You are hereby authorised to draw upon this bank at six months' sight to the extent of £15,000 sterling and such drafts I undertake duly to honour on presentation." Of this letter Lord Cairns says: "It is a general invitation issued by the Agra and Masterman's Bank through Dickson Tatham and Co. to all persons to whom the letter may be shown to take bills drawn by Dickson Tatham and Co. on the Agra and Masterman's Bank with reference to the letter and to alter their position by paying for such bills, with an assurance that if they or any of them will do so, the Agra and Masterman's Bank will accept such bills on presentation." The only difference between that letter and the present is, that the promise is to honour *on presentation*; but the words *on presentation* can make no difference, as a bill or draft may be presented either for acceptance or for payment.

For these reasons we are of opinion that the letter of credit affords no defence to the suit, and we would so answer the reference. The case will now go back to the Court at Aden to be dealt with in accordance with the Act, and the costs of the reference will be costs in the suit.

*Order accordingly.*

(1) (1867) L. R. 2 Ch. 391.

## *FULL BENCH.*

## APPELLATE CRIMINAL.

*Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Candy, Mr. Justice Fulton and Mr. Justice Chandavarkar.*

1901.
*June 24.*

KING-EMPEROR v. BABYA BHIVA.*

*Whipping Act (VI of 1864 as amended by Act III of 1895), section 4—Whipping—Dacoity—Penal Code (Act XLV of 1860), section 395—Previous conviction—Sentence.*

Under section 4 of the Whipping Act as amended in 1895, a sentence of whipping in addition to imprisonment is not legal in the case of a conviction of dacoity which was committed prior to the previous conviction of a similar offence.

*Reg.* v. *Surya* (1) and *Reg.* v. *Kusa* (2) followed.

APPEAL from the conviction and sentence passed by A. Lucas, Sessions Judge of Ahmednagar.

The accused was charged with dacoity and also with the offence of belonging to a gang of persons associated for the purpose of committing dacoity, under sections 395 and 400 of the Indian Penal Code; and was committed to the Court of Session at Ahmednagar.

At the trial the charge under section 400 was withdrawn, as the accused had already been convicted under that section in a previous case.

The accused was then tried for dacoity under section 395, and was found guilty. He was sentenced to undergo rigorous imprisonment for five years, the sentence to run concurrently with another sentence of imprisonment, and to receive thirty stripes.

In passing the sentence of whipping the Sessions Judge said:

I have already convicted him of another offence of dacoity, and according to the letter of the law as found in the Whipping Act III of 1895, he is liable on a second conviction for dacoity to whipping in addition to any other punishment. For that there is a Calcutta High Court ruling: *Queen* v. *Udai Patnaik*,(3) that in a case like this whipping should not be given but

* Criminal Appeal No. 170 of 1901.

(1) (1866) 3 B. H. C. R. Cr. C. 38. (2) (1870) 7 B. H. C. R. Cr. C. 70.

(3) (1869) 4 Ben. L. R. Ap. Cr. 5.

only when an accused person is again convicted after he has completed his sentence for the former offence. I can find no Bombay ruling in support of such a view, nor does the wording of the Act, in my humble opinion, warrant such a view. In a case like this when the accused has been with a gang notorious throughout this district for brutalities in the way of nose-cutting, &c., I think that a sentence of whipping is peculiarly suitable.

The case was heard by a Division Bench (Candy and Fulton, JJ.) who made the following reference to a Full Bench :

Having regard to the decision in *Queen* v. *Udai Patnaik and others*,(1) *Reg.* v. *Surya bin Krishna Mandavkar*(2) and *Reg.* v. *Kusa valad Lakshman*,(3) the Court refers to a Full Bench the question whether under section 4 of the Whipping Act a sentence of whipping in addition to imprisonment is legal in the case of a conviction of dacoity which was committed prior to the previous conviction of a similar offence.

The reference came before a Full Bench (Jenkins, C.J., Candy, Fulton and Chandavarkar, JJ.).

There was no appearance either for the Crown or for the accused.

*Per Curiam* :—Having regard to the fact that a Full Bench of this Court in 1866 in *Regina* v. *Surya*(4) decided this question in the negative, and that this ruling was followed in 1870 in *Regina* v. *Kusa*(5) by two other Judges, and that the Legislature in their amending Acts of 1895 and 1900 apparently accepted that ruling, which is also that of the Calcutta High Court, we answer the question referred to us in the negative.

(1) ('869) 4 Beng L. R. (Cr.) 5 ; 12 Cal. W. R. Cr. 68.
(2) (1866) 3 B. H. C. R. Cr. C. 38.
(3) (1870) 7 B. H. C. R. Cr. C. 70.
(4) (1866) 3 B. H. C. R. Cr. C. 38.
(5) (1870) 7 B. H. C. R. Cr. C. 70.

## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.*

1901. *July* 31, *August* 7 *and* 14.

DADOBA JANARDHAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE COLLECTOR OF BOMBAY (ORIGINAL DEFENDANT), RESPONDENT.*

*Land Revenue in Bombay—Assessment—Enhancement of assessment—Bombay Act II of 1876—Sale of land by Government to a purchaser assessed at a certain rate—Subsequent enhancement—Vendor and purchaser—Estoppel—Evidence Act (I of 1872), sec. 115.*

Certain lands in Bombay consisting of three separate plots were held by the Trustees of the Free Church of Scotland Mission under a grant from Government (no deed, however, being executed) for the purposes of a school for native girls. No assessment was paid for a part of the land and a merely nominal assessment was paid for the rest. Being desirous of transferring the school to another locality, the Trustees obtained the consent of Government to sell the land, and in order to put the Trustees in a position to sell, certain indentures were executed to the Trustees. Plot 1 was conveyed by Government to them "their heirs and assigns for ever" subject to a right of resumption, but without any mention of assessment. Plots 2 and 3 were conveyed by Government to them, "their heirs, executors, administrators and assigns for ever," but in this case the conveyance was "subject to the payment of all taxes, rates, charges and assessments leviable or chargeable in respect of the premises or anything for the time being thereon."

On the 25th August, 1886, one Janardhan Gopal offered to buy the whole piece of land for Rs. 32,500, on condition (*inter alia*) that the whole property should be conveyed to him "as freehold tenure or for a nominal Government tax." The Trustees desired to accept this offer, and communications took place between them and Government with reference to it. On the 21st June, 1887, they wrote to Government stating that it was most desirable that the offer should be accepted, but that the purchaser required that the amount of assessment on the land should not exceed what was payable in respect of pension and tax tenure in the same locality, and they requested the Government to ask the Collector of Land Revenue to say "what the land would be assessed at for the purposes of the land revenue, it being assumed that the land was of the pension and tax tenure." On the 11th July, 1887, the Government passed a Resolution in reference to this request as follows: "The land in question will be liable in the purchaser Mr. Janardhan Gopal's hands to be assessed under the rules ordinarily applicable to land of the same description. The Collector should be desired, on the application of either the Secretary of the Free Church Mission or of the purchaser, Mr. Janardhan Gopal, to state what the assessment of the land revenue will be and what are the rules affecting the amount of the assessment."

* Revenue Suit No. 18 of 1899; Appeal No. 3 of 1901.

Acting on this Resolution Messrs. Ardesir Hormasji & Co. as attorneys both for the Trustees and the purchaser wrote to the Collector on the 14th July, 1887, setting forth the above Resolution, and requesting him to furnish the desired information. On the 25th July, 1887, the Collector replied: "I have the honour to inform you that the land will be assessed at the rate of nine pies per square yard per annum. This is the rate of assessment which is charged for Government land in this locality * * * * which has been followed for the last six years."

With a view to facilitate the sale by the Trustees to Janardhan Gopal, the Government on the 20th December, 1887, granted all the reversion and estate in the three plots of land to the Trustees, their heirs, administrators and assigns for ever, but subject to the payment of taxes, rates, charges, assessments leviable or chargeable in respect of the premises or anything for the time being thereon. The deed recited that the Trustees, with the approval of Government, had resolved to sell the said land and that they had agreed with the said Janardhan Gopal for the absolute sale of the same to him.

On the 16th January, 1888, the land was conveyed to Janardhan Gopal, the purchaser. The parties to the deed were the Trustees of the Mission, the Secretary of State, and the said Janardhan Gopal, and it recited that the Trustees had agreed for the absolute sale of the land to Janardhan Gopal, and with the consent of Government it conveyed the same to him, "his heirs, executors, administrators and assigns for ever, subject to the payment of all rates, taxes, charges, assessments leviable or chargeable in respect of the premises." And the Secretary of State for himself and his successors released and discharged the said Janardhan Gopal, his heirs, executors, administrators and assigns from all manner of rights, powers, authorities and privileges reserved in respect of the premises &c. &c.

In 1893 the property became vested (under a partition) in the plaintiff, who was Janardhan Gopal's son. Until 1899 the assessment of nine pies per square yard was paid, but in August 1899 the plaintiff received from the Collector a notice under section 8 of Bombay Act II of 1876 that the assessment was enhanced to six annas and six pies per square yard per annum. The plaintiff thereupon filed this suit in the Court of the Revenue Judge under section 14 of Bombay Act II of 1876, contesting the legality of the enhancement. The Revenue Judge dismissed the suit. On appeal to the High Court,

*Held*, reversing the decree and setting aside the order of enhancement, that the plaintiff had a right to hold the land for ever on payment of assessment at the rate of nine pies per square yard per annum, and that the Government had no right to enhance the said rate. Janardhan Gopal had purchased the property out-and-out for its full value. To such a purchaser the right to enhance the assessment should in all fairness have been clearly disclosed. The meaning that a reasonable man would under the circumstances ascribe to the Collector's letter of the 25th July, 1887, was that a specific limit of nine pies per square yard per annum was established under section 8 of Bombay Act II of 1876. That being so, the Government and the Collector were bound. The conduct of Government, coupled with the statement of Government made on their behalf

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for the purposes of the purchase was, under the circumstances, such as to create and encourage in the purchaser as a reasonable man the belief that he was purchasing property substantially worth Rs. 33,000, and that Government were not silently reserving to themselves an unfettered right to destroy the value of that property and practically to confiscate that which had been sold.

APPEAL from the decision of the Revenue Judge, W. Webb, Acting Chief Presidency Magistrate.

By a notice dated the 24th August, 1899, but served on the plaintiff on the 1st September, 1899, the Collector of Bombay, under section 8 of the Bombay Act II of 1876, gave the plaintiff notice that he had fixed the assessment for land revenue payable by the plaintiff in respect of certain land situate in Bombay of which he was the owner, at six annas and six pies per square yard per annum, such assessment to come into force on the 1st October, 1899, and to be guaranteed for fifty years. The assessment on the said land up to that time had been nine pies per square yard.

The plaintiff immediately filed this suit in the Court of the Revenue Judge of Bombay under section 14 of Bombay Act II of 1876 contesting the legality of the assessment.

On the 10th October, 1900, the Revenue Judge dismissed the plaintiff's suit with costs. The plaintiff now appealed.

The land in question belonged to the Government of India, and originally consisted of three separate plots adjacent to each other situate near French Bridge, Girgaum, in Bombay. It had been held since the year 1865 by the trustees of the Free Church of Scotland Mission, and used by them for the purposes of a boarding school for native girls. Plot No. 1, consisting of 1,484 square yards, was granted to the said trustees in or about the said year as a site for the school. Plot No. 2, consisting of 1,011 square yards, was used as a play-ground, and was held by the trustees on a yearly tenancy at a nominal rent; and plot No. 3, consisting of 578 square yards, was a passage used for the purpose of access to the back of the school-house. It was held on sufferance. Although the whole of the land was in the possession of the said trustees from about the year 1865, no deed in respect of any portion of it was executed until the year 1884 as hereinafter stated.

In the year 1879, the trustees considered the situation unsuitable and desired to transfer the school elsewhere. They accordingly addressed a letter to Government requesting permission to sell the school-house and the land connected with it and to devote the proceeds of such sale to the establishment of the school in another locality. The Government assented to this proposal, and in order to put the trustees in a position to sell, the Government by a deed dated 1st October, 1884, conveyed plot No. 1 to them, "their heirs and assigns for ever," and by a lease of the same date plot No. 2 was leased to the said trustees for a year as from the 1st July, 1885, and so from year to year at the yearly rent of Re. 1, until the demise should be determined. This lease contained a covenant by the lessess to pay "all rates, taxes, assessments, duties and charges which are or may become due or payable in respect of the said premises."

An offer to purchase the land was subsequently made by one Narayan Mulji, and the Secretary to the Mission requested the Government of Bombay to ascertain from the Government of India on what terms the land could be made over to a purchaser. The Government of India suggested that the whole of the land should be sold as one plot and should be valued as such by a professional valuer.

On the 25th August, 1886, Janardhan Gopal, the father of the plaintiff, made the following offer to purchase the land in question:

"I have this day made an offer of Rs. 32,500 (Rupees thirty-two thousand and five hundred) for the purchase of the building near French Bridge, known as the Free Church Boarding School, together with the site admeasuring about 1,450 square yards belonging to the school and also all that piece of ground admeasuring 1,011 square yards at the rear or between the school site and the Railway line.

The whole property as above described admeasuring 2,461 square yards or thereabouts shall be conveyed to me as freehold tenure, or for a nominal Government tax.

The vendors shall make out a marketable title to the aforesaid property. In the event of their inability to do so, it will be at my option to complete the contract or not. The entire expense of conveying the whole property to me by the Free Church Mission as aforesaid to be borne half and half by me and the vendors.

In case of the Government refusing to sell the piece of ground admeasuring 1,011 square yards for Rs. 5 per square yard, the writing to fall through.

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If the final conveyance is not executed within four months from this date, it shall be at my option to make myself free from the contract.

The final conveyance should be executed by all the proper parties.

This contract is effected through Messrs. Sorabshaw and Company, and they shall be entitled on completion of the purchase, but not otherwise, to their brokerage at two per cent. on the purchase-money from the purchaser and two per cent. from the vendors."

On the 31st August, 1886, the Secretary to the Mission forwarded the above offer to Government with the following letter:

To the Honourable J. B. RICHEY, Esq., C.S.I.,

Chief Secretary to Government.

Sir,—In a letter dated 24th July, 1879 (a copy of which is annexed), the Acting Chief Secretary to Government communicated to us the favourable reply of His Excellency the Governor in Council to our application for permission to sell the Free Church Boarding School near French Bridge.

2. For some time no suitable offer was forthcoming and the school continued to work on under the difficulties which first led to our application. But then especially the openly immoral character of the immediate surroundings having been increasingly obnoxious, it has been felt necessary to make special efforts to dispose of the building, and I have now the honour to submit for the consideration of Government the accompanying offer which is the most favourable that has yet been made to us. (See copy annexed.)

3. The sale of the building has been retarded mainly by our inability to offer for sale along with the building and its limited site, the plot No. 2 of ground lying between the school site and the Railway, which is held by the school for the purpose of a compound at a nominal rental of one rupee per annum. We are not in a position to guarantee to the purchaser the enjoyment of the same privileges in regard to this portion of land, and as the ground attached to the school in freehold comprises a little less than 1,500 square yards, it is considered inadequate by the purchaser who desires to acquire the property as a residence.

4. The present offer requires that the ground sold with the school should include this piece of land, and we have the honour to request that Government may be pleased to make such arrangements with respect to this portion of ground as will facilitate the disposal of the property.

5. Judging from our recent experience, we have reason to think that the offer in question is one which we should accept if we could thereby transfer, after brokerage and other expenses have been deducted, say Rs. 28,000 to any other property of which Government may approve, but apart from this particular offer on which we have now the honour to ask the orders of Government, it is of very great importance that this portion of ground, which is so situated as to be of very little use to any other property should, if possible, be made over to

the school and disposed of along with the school building as part of the site pertaining to it. (Signed) D. MACKICHAN.

By Government Resolution, dated the 6th September, 1886, the Collector of Bombay was requested to carry out the instructions of the Government of India with regard to the valuation of the land, and he thereupon employed Mr. John Campbell, a Surveyor, to value the land. Mr. Campbell made a report showing the total value of the land and building in occupation of the Mission to be Rs. 31,936, the value of plot No. 2 (1,011 square yards) being taken at Rs. 1-8-0 per square yard. This report was forwarded by the Collector to the Government, which on the 18th December, 1886, passed the following Resolution :

The land should now be sold in accordance with the instructions of the Government of India in their letter No. 228 of 31st July last, embodied in Government Resolution No. 1420 of 6th September, 1886, the Free Church Mission paying to Government the price of the plot as valued.

This Resolution was forwarded to the Mission, and on the 15th January, 1887, the Secretary of the Mission informed the Government that they had determined to accept the offer of Mr. Janardhan Gopal, who had agreed to pay Rs. 32,500 for the whole property.

On 11th February, 1887, Messrs. Ardeshir, Hormasji and Dinsha, who were acting as Solicitors both of the purchaser and the Mission, submitted to the Collector for approval two draft conveyances, viz.—(*a*) a conveyance of the leasehold plot No. 2 to the trustees with a view to this plot being included in the sale to Janardhan Gopal, and (*b*) a conveyance of the whole of the land to Janardhan Gopal.

On the 28th February, 1887, the Collector returned the drafts to Messrs. Ardesir Hormasji and Dinsha "duly approved by the Government Solicitor as altered in red ink." These drafts were lost and were not produced at the hearing of the case, but the following letter, which was produced and put in, addressed by Messrs. Ardeshir, Hormasji and Dinsha to the Collector, shows the nature of the alterations made in the drafts :

*Bombay, 19th March, 1887.*

To J. MACLEOD CAMPBELL, Esq., Acting Collector, Bombay.

Sir,—Referring to your letter to us of the 28th ultimo, returning draft

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conveyance in this matter approved on behalf of Government, we have the honour to state that the alterations made in the drafts to the effect that the property shall be subject to taxes, assessment, &c., are inconsistent with the agreement of sale of the 25th August, 1886, between the trustees of the Free Church Mission of the one part and Mr. Janardhan Gopal, purchaser, of the other part, whereby it was stipulated that the whole of the property should be conveyed to the purchaser as a freehold tenure or for a nominal Government tax, which agreement was before Government when they were pleased to sanction the sale by the trustees.

Our client, Dr. Mackichan, the Secretary to the Mission, personally saw the Solicitor to Government, with a view to have the alterations in the drafts removed, but he was referred by him to you. Whereupon Dr. Mackichan and subsequently our Mr. Ardeshir saw you personally on the subject. Mr. Ardeshir at the interview he had with you understood that the alterations had reference only to municipal taxes. If so, we propose that the alterations be so modified as to make this clear by express mention and to exclude Government rights also by express mention.

We have accordingly modified the alterations in blue ink and we now send the drafts again to you for approval so far as the point in issue is concerned.

As the Rev. Mr. Miller, one of the trustees, will have to sign the deeds, and is shortly to leave for Europe, we request that you will be so good as to expedite the return of the drafts.

(Signed) ARDESHIR, HORMASJI AND DINSHA,
Purchaser's Attorneys.

On the 31st May, 1887, the Secretary to Government wrote to the Mission as follows:

Sir,—With reference to the correspondence ending with the Department letter No. 271, dated 15th February, 1887, I am directed to inform you that the Acting Collector of Bombay, in forwarding for the approval of Government two draft conveyances connected with the sale of the Free Church Boarding School near the French Bridge, has brought to notice that Messrs. Ardeshir, Hormasji and Dinsha, Solicitors to the Free Church Mission, contend that the alterations made by the Solicitors to Government at pages 11 and 25 of the drafts are not consistent with the agreement of sale, dated 25th August, 1886, between the Free Church Mission and Mr. Janardhan Gopal. I am to state that Government have no knowledge of this agreement of the 25th August said to have been come to between the trustees of the Free Church Mission and Mr. Janardhan Gopal; it has never been before them, nor was Government a party to it. Government therefore are of course in no way bound by this agreement.

2. I am to add that in the absence of any order of Government sanctioning the conveyance of the land to Mr. Janardhan Gopal free of liability to assessment to the land revenue, the Solicitor to Government has rightly assumed that no such exemption was contemplated.

In reply the Secretary to the Mission wrote as follows:

With reference to your letter No. 894 of 1887 re the sale of the Free Church Boarding School near the French Bridge, Girgaum, I have the honour to state that a provisional agreement was come to in August last between the trustees of the Free Church Mission and Mr. Janardhan Gopal, and that it has been with the view of completion of this agreement that questions concerning the property have been since that date before the Governments of India and Bombay.

It was not the understanding or intention of the Mission that the agreement was binding on Government. And neither the Mission nor the purchaser expected a complete exemption of the land referred to in the agreement from assessment to land revenue. What the Solicitors, Messrs. Ardeshir, Hormasji and Dinsha, point out is that the price offered by the purchaser, viz. Rs. 32,500, for the property was on the understanding expressed in the agreement for sale that the purchaser would not be required to pay to Government more than a nominal Government tax. We understand that what the purchaser asks is that the amount charged may not exceed what is payable in respect of land of pension and tax tenure in the locality.

Having regard to the fact (1) that the piece of land containing 1,484 square yards has been held by them free from assessment to land revenue, and (2) that they pay only one rupee per annum on account of the vacant land, the trustees believe that even in the event of the sale of the same and the consequent change in the ownership of it Government would not place a heavy assessment on it; that at any rate they would not assess it in excess of what the land was subject to before it was let to the Mission or of what pension and tax land in the neighbourhood is liable to pay.

It is the earnest desire of the Mission that this contract be completed.

Under the circumstances we hope that Government will be good enough to state or ask the Collector of Land Revenue to say what the land will be assessed at for purposes of the land revenue, it being assumed that the land was of the pension and tax tenure. The completion of the sale depends on the determination of this question, as also on the question whether a small piece of land which though not included in the original grant has been used as a portion of the school premises (which question is already the subject of correspondence between Messrs. Ardeshir, Hormasji and Dinsha and the Collector) shall be included in the sale to Mr. Janardhan, and I have to state that the Mission will feel greatly obliged to Government for an early disposal of the matter.

On the 11th July, 1887, the Government published the following Resolution with reference to the above letter of the 21st June:

It of course does not follow that because Government allowed the land to be free of assessment or to be assessed at only a nominal amount as long as it was occupied for the purposes of an educational institution, they will continue that exemption when the land passes for other purposes into other hands. It would not be fair to the general tax-payers for Government to do so.

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The land in question will be liable in the purchaser Mr. Janardhan Gopal's hands to be assessed under the rules ordinarily applicable to land of the same description. The Collector should be desired on the application of either the Secretary of the Free Church Mission or of the purchaser, Mr. Janardhan Gopal, to state what the assessment of the land to the land revenue will be, and what are the rules affecting the amount of the assessment, and the Secretary should be informed that the Collector has been so desired.

On the 14th July, 1887, Messrs. Ardeshir & Co. wrote the following letter to the Collector:

In a letter addressed by the Acting Chief Secretary to Government to the Secretary, Free Church Mission, in reference to the claim for exemption from land revenue made by the purchaser of the above property, the latter has been informed that you had been requested on the application either of the Free Church Mission or the purchaser, Mr. Janardhan Gopal, to state what the assessment of the land revenue will be and what are the rules affecting the amount of the assessment. We have therefore, as attorneys for both the Mission and the purchaser, to request that you will be so good as to furnish us with the desired information.

We understand that the whole of the land was of Pension and Tax tenure prior to its having been taken over by Government for the purpose of the Mission school.

On the 25th July, 1887, the Collector replied

In reply to your letter of the 14th instant on the subject of the assessment of the land occupied by the Girgaum Mission school, I have the honour to inform you that the land will be assessed at the rate of nine pies per square yard per annum. This is the rate of assessment which is charged for Government land in this locality in accordance with a scale of varying rates in different localities which was laid down by Mr. Jacomb when Collector and which has been followed for the last six years.

The fact that the land was of the Pension and Tax tenure before it was taken up by Government does not affect the assessment now to be levied, as the pension and tax tenure ceased when the land was bought up by Government.

On the 20th December, 1887, a deed was executed between the Secretary of State for India of the one part and the trustees of the Mission of the other part, whereby, after reciting the above-mentioned lease of plot 2, dated the 1st October, 1884, and that the land then demised was so demised as a play-ground in connection with the land and the hereditaments (*i.e.* plot No. 1) adjoining the same which were also granted by Government to the said trustees by another indenture of the 1st October, 1884

(abovementioned), and that another piece of land (plot No. 3) had been permitted to be used as part of the garden and play-ground aforesaid and had been treated as held by the said trustees on sufferance and that the said trustees had with the approval of Government resolved to sell all three pieces of land and that Government with a view to facilitate the said sale had agreed to grant to the trustees all their reversion and estate in the said respective premises and that the trustees had entered into a contract with one Janardhan Gopal for the absolute sale to him of all three pieces of land, it was witnessed that the Government did thereby grant to the said trustees, their executors, administrators and assigns as to plot No. 2 all their reversion and estate expectant on the determination of the lease of the 1st October, 1884, and as to plot 3 all their reversion and estate expectant on the determination of the beforementioned demise on sufferance to hold all the aforesaid premises to the use of the said trustees, their heirs, executors, administrators and assigns, "but subject to the payment of all taxes, rates, charges and assessments leviable or chargeable in respect of the said premises or anything for the time being thereon."

On the 16th January, 1888, the whole of the aforesaid land consisting of the said three plots was conveyed to Janardhan Gopal for Rs. 33,000. The parties to the conveyance were the trustees of the Mission of the first part, the Secretary of State of the second part, and Janardhan Gopal of the third part, and the land was thereby conveyed to the said Janardhan Gopal, his heirs, executors, administrators and assigns for ever "but subject to the payment of all taxes, rates, charges, assessments leviable or chargeable in respect of the said premises or anything for the time being thereon;" and the Secretary of State did thereby for himself and his successors acquit, release and for ever discharge the said Janardhan Gopal, his heirs, executors, administrators and assigns of and from all manner of rights, powers, authorities and privileges to him and his successors reserved in respect of the premises therein—before fully described in and by the indenture of grant of the 1st October, 1884, and from all consideration, limitation and obligation by the said indenture imposed upon the use and enjoyment of the said piece of land and hereditaments and premises.

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In 1893 the land in question became vested in the plaintiff (the son of Janardhan Gopal) on a partition. Until 1899 the assessment thereon at the rate of nine pies per square yard was paid, but on the 24th August, 1899, the Collector gave the notice already mentioned to the plaintiff that after the 1st October 1899 the assessment would be at the rate of six annas and six pies per square yard and was guaranteed for a period of fifty years from that date.

The plaintiff thereupon (on the 26th September, 1899) filed this suit under section 14 of Bombay Act II of 1876.

By Government Resolution, dated the 6th January 1900, the enhancement of assessment made by the Collector was sanctioned.

In his plaint the plaintiff set forth the above facts and relied on the letters above set forth of Messrs. Ardeshir Hormasji and Dinsha to the Collector, dated the 14th July 1887, (*supra* page 722) and the Collector's reply, dated the 25th July, 1887 (*supra* page 722). The following paragraphs of the plaint are material:

10. On the faith of the understanding that assessment at the rate so fixed and no more would be charged by Government to the purchaser with regard to the said premises the purchaser completed the said purchase, and the said assessment has been since paid.

11. The plaintiff says that the purchaser had from the first stipulated for a fixed nominal assessment, and that though he consented in the end to the substantial assessment fixed by Government, he never imagined that the said assessment was to be subject to revision and enhancement at the pleasure of Government, and that neither during the course of the negotiations nor at the completion of the said purchase was any in imation given to the purchaser by or on behalf of Government that the assessment they wished to fix and which they did fix would be liable to revision and enhancement, and the plaintiff submits that if any such revision or enhancement was in contemplation, which he denies, or was believed to be competent to Government, they were in law bound to have informed the purchaser of the same before he completed the purchase and they would have done so.

12. Recently, however, the plaintiff has been served with a notice from the Collector of Bombay, dated the 24th day of August last, but received by the plaintiff on the 1st instant, intimating that he had fixed the assessment on the said premises at the rate of six annas and six pies a square yard, the same to come into force on 1st October, 1899. This assessment will amount to Rs. 1,248-6-0 per annum, which sum, even at 25 years' purchase, represents a capital value for the land above of Rs. 31,200, which land is thus claimed to be

still in Government in spite of the absolute grant by them of the said premises at their full price and value to the said trustees and through the trustees to the plaintiff's father, and through the latter to the plaintiff as hereinbefore more particularly set out. The plaintiff says that if the said assessment be upheld the effect of it would be to reduce the selling value of the said property by fully Rs. 30,000.

13. The plaintiff says that the said revision and enhancement of assessment are in breach of the agreement and understanding above referred to, and that in any case Government by their conduct aforesaid are estopped from claiming any right to enhance the assessment once so fixed. The plaintiff states that if any intimation or hint that Government claimed such right had been given to the said purchaser before the completion of the said purchase, the said purchaser would have been entitled to refuse to complete the said purchase and would certainly have refused to do so, nor would any other purchaser for the said property have been found. The plaintiff is also advised and submits that Government can claim no rights in respect of the said premises which are not expressly or by necessary implication reserved to them under the said Indentures executed by them to the said trustees and the purchaser, and that the said Indentures do not contain any such reservation.

14. The plaintiff therefore contends that in the circumstances above set out there is a right on his part in limitation of the right of Government to raise the said assessment and that a specific limit to assessment, viz. nine pies per square yard per annum, has been already established and preserved with regard to the premises in question within the meaning of section 8 of the City of Bombay Land Revenue Act, under which the said assessment has been raised, so that no assessment can be fixed which exceeds such limit.

15. The plaintiff also says that if there be any right in Government, which he denies, to enhance the assessment once fixed on the said premises, the enhancement now made is in any case beyond reason and precedent premature, and is also beyond reason and precedent excessive for land of the character in question, and on those grounds also the said assessment is wrong and illegal, and ought to be disallowed.

The prayer of the plaint was as follows:

(*a*) That it may be declared that there is a right on the part of the plaintiff in limitation of the right of Government to hold his said land for ever on payment of assessment at the said rate of nine pies per square yard per annum and that Government have no right to enhance the said rate.

(*b*) That in any case the said revision of assessment may be declared to be premature and may be set aside.

(*c*) That in any case the increased assessment may be declared to be unreasonably excessive and unwarranted by anything that has occurred in the circumstances of the property and that the same may be set aside.

(*d*) That the defendant may be ordered to make full and complete discovery to him of all the documents and papers, including all Government Resolutions,

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instructions and rules in his possession or power in any way relating to the said original assessment of the said land and to the revision and enhancement of it now notified by the defendant.

(e) That the plaintiff may have such further or other relief as the circumstances of the case may require.

The following was the defendant's written statement:

1. The defendant says that the Government were not parties to the negotiations between the plaintiff's predecessor in title and the trustees of the Free Church of Scotland Mission for the purchase by the former of the land and premises in the plaint described, and that the Government did not agree, nor hold out any representations to the parties to such negotiations that the said land and premises should be assessed at a nominal assessment and that such assessment should thereafter be maintained for ever or for any definite time at the same amount. As a matter of fact, the Government refused to agree that the said land and premises should be treated in any way different from other Government lands which were liable from time to time to be assessed.

2. The defendant further says that the Government never agreed nor represented that the said trustees should be enabled or would be able to convey to the plaintiff's predecessor in title an estate in fee simple free from Government assessment or from assessment at anything more than a nominal sum.

3. At the time of the purchase of the land and premises, Messrs. Ardeshir Hormasji and Dinsha were acting as attorneys for the purchaser as well as for the trustees in the matter of the said purchase and they were duly informed of the fact that the Government were not willing that the said land and premises should be conveyed to the purchaser in fee simple, but that the said land and premises would be assessed in the same manner as other assessable Government lands were assessed and the said land and premises were conveyed to the purchaser subject to the payment of Government assessment.

4. The defendant further says that the enhanced assessment complained of in this suit is perfectly legal and is not contrary to any agreement or understanding on the part of the Government, nor is the Government estopped by any conduct on their part or that of their officers from making such enhancement.

5. The defendant further says that if the Government are entitled to enhance the assessment on the land and premises, it is not competent to this Court to interfere with the amount thereof, but if the plaintiff feels himself aggrieved thereby his remedy is to petition the Government for a reduction of the assessment now put upon the said land and premises.

The following issues were raised at the hearing:

1. Whether there is a right on the part of the plaintiff in limitation of the right of Government to hold his land for ever on payment of assessment at the rate of nine pies per square yard per annum.

2. Whether the Government ever agreed or represented that the said land should be conveyed to the plaintiff's predecessor in title in fee simple from Government assessment or from assessment from anything more than a nominal sum.

3. Whether there is any right on the part of the plaintiff in limitation of the right of Government through the Collector to assess land from time to time at his discretion.

4. Whether it is competent for this Court to inquire into the unreasonableness or excessiveness of assessment fixed by the Collector and to set aside or alter the same.

5. Whether there was any understanding as set out in paragraph 10 of the plaint, and if so, whether Government was a party thereto as alleged.

6. Whether the notice of the assessment issued by the Collector of the 24th August, 1899, was issued under the orders or with the authority of Government.

7. If not, whether such notice is not illegal and inoperative so as to terminate any right or interest of the plaintiff.

8. Whether the plaintiff is not entitled to hold 1,484 square yards, a portion of the land in the plaint mentioned, free from all Government assessment for ever.

9. Whether the Government have any right to enhance the rate of assessment in respect of any, and if so, what portion of land in suit.

10. If so, whether Government are not estopped by their conduct, representation and acts from asserting such right.

11. The general issue whether plaintiff is entitled to the relief prayed for or any part thereof.

12. Whether the revision of the assessment in the plaint complained of is not premature beyond precedent.

The Revenue Judge (Mr. Webb, Acting Chief Presidency Magistrate) dismissed the suit with costs. In his judgment he said:

It has been argued for the plaintiff that plot No. 1 was held by him or his predecessor in title as an absolute freehold property free from all taxation and that the proviso 'subject to all rates, taxes, &c.,' contained in the deed conveying to him his title was not applicable to plot No. 1. On this point, however, as it appears to me, this proviso manifestly applies to all the three plots, or in other words to the land conveyed to Mr. Janardhan, and this view was accepted by him when the deed conveying to him the property received his signature, and also by his subsequent action in paying the Collector's bills of assessment at the rate of nine pies per square yard on the whole of the property so conveyed. I am therefore of opinion that the plaintiff is not entitled to hold 1,484 square yards (plot No. 1), a portion of the land in the plaint mentioned, free from all Government assessment for ever, and in no other manner has any attempt been made to show that there was any understanding between the Government and the plaintiff's predecessor in title that he should hold the ground at the rate of assessment then fixed for ever as set forth in paragraph 10 of the plaint.

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Although it has been argued that the defendants are now estopped by their conduct, misrepresentations and acts from asserting their right, (if they possess such right) to enhance the rate of assessment of any portion of the land—not by intentional misrepresentation on their part, but by their acts leading the plaintiff's father to believe as an ordinary man would be induced to believe, that the fixing by Government of nine pies per square yard as the rate of assessment on the said land at the time of its purchase by him would continue for ever, and that as a reasonable person he accepted this as a representation of their intention that there would be no enhancement but that the rate then fixed would continue in perpetuity, yet no evidence has been given to show that Government either intentionally or indirectly led the plaintiff's father to believe that Government conferred on this land the right to a fixed and permanent rate of assessment, and I have been unable to find in any of the correspondence admitted in evidence which passed between Government and the plaintiff's father, or any one acting in his interest or on his behalf, that any conduct on Government's part misled him or that any reasonable inference that such was their intention could be drawn from any acts on their part or behalf at that time.

The deed of conveyance to Mr. Janardhan Gopal is barren of any specified fixed rate, and it is worthy of note that he made no attempt to have the specific rate he says he believed he should ever be called on to pay embodied in the deed.

With respect to the issue whether the revision of the assessment is not premature beyond precedent, no evidence has been offered, and there is therefore nothing to show me that such is the case.

There appears to me nothing in the Revenue Act to show that when there has been no specific limit to assessment established and when there is no right on the part of the superior holder in limitation of the right of Government to assess, the Collector cannot, subject to the control of Government, assess land from time to time, and that therefore there is nothing illegal in the enhancement of the assessment by him of the plaintiff's property. It may be (and if the evidence of the plaintiff's father is to be believed, and there is no reason to doubt it,) that he is undergoing a hardship in having to pay assessment on his land at a rate which would leave him a return of Rs. 7 per mensem on a capitalized sum of Rs. 47,000, and were it a part of my duty to do so, I should say his was a case entitling him to sympathy, but this is entirely a matter to be met by appeal to Government praying under the circumstances for a reduction of the enhanced assessment, but I am not called on to do more than decide what in my opinion is the law on the issues raised in this suit and whether the plaintiff is entitled to any part of the relief prayed for, and for the reasons above stated I do not think he is entitled to any relief in this suit. I find therefore all the issues in the defendant's favour and dismiss the suit with costs.

The plaintiff appealed. The grounds of appeal stated in his memorandum of appeal were as follows:

1. That the notice of enhancement, dated the 24th August, 1899, was not issued under the order or with the authority of Government, and that the subsequent sanction of Government by Resolution dated 6th January, 1900, did not render such notice valid.

2. That the Revenue Judge was wrong in holding that it was not competent to him to inquire into the reasonableness of the assessment.

3. That the Revenue Judge was wrong in holding that when land revenue has once been fixed and levied under section 8 of Bombay Act II of 1876, the Collector had power from time to time to enhance such assessment.

4. That the plaintiff had proved as to plot No. 1 that Government had parted with all their rights in said plot and that he held it as absolute owner free from all right of Government to assess.

5. That as to plots 2 and 3 the Judge ought to have held that the plaintiff had proved that a specific limit to assessment, viz. nine pies per square yard, had been established and preserved, and that neither the Collector nor Government had power to exceed such limit.

6. That in the alternative and assuming that the said land was liable to assessment in 1887, the Collector as the representative of Government was estopped by the conduct, acts and representations of Government during the negotiations for the purchase of the said land by the plaintiff's father, from alleging that the fixed limit of assessment of nine pies per square yard had not been agreed to in perpetuity by Government.

7. That the Judge ought to have held that the Government had led the plaintiff's father to believe that the land would be sold and conveyed to him subject to the payment of assessment in perpetuity of nine pies per square yard per annum, and that upon the faith of such representation by Government, the plaintiff's father was induced to buy the property which he would not have done had he been given to understand that the assessment was liable to be enhanced, and that therefore the Judge ought to have held that the Government were now estopped from exercising their right (if any) to enhance.

8. That the Judge was wrong in holding that there was not any understanding as alleged in paragraph 10 of the plaint and that Government was not as part to such understanding.

*Rivett-Carnac* and *G. S. Rao* for appellant:—We contend that the Collector had no right to enhance the assessment on the plaintiff's land. First, we say that the notice of enhancement dated the 24th August, 1899, served on the plaintiff was unauthorised and invalid. By section 8 of Bombay Act II of 1876 the Collector is to act "subject to the orders of Government." If these words have any meaning, it is that the Collector must obtain the sanction of Government before he acts. A subsequent sanction is not enough. In this case Government did not sanction

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the enhancement until the 6th January, 1900, *i.e.* five months after the notice of enhancement was given.

Next, we submit that the use of the word "settlement" in section 9 of the Act implies negotiation with the person whose land is to be assessed. In this case the plaintiff was given no opportunity of stating his case to the Collector. He knew nothing of the intention to enhance the assessment until the notice was served on him and then he had no remedy but a suit within thirty days under section 14 of the Act. It is clear that section 9 contemplates a decision reached after consultation. Compare also Regulation XVII of 1827, section 3, which related to assessment of land in the mofussil.

Further, we submit that the Act only authorises the assessment of land held under Government, *i.e.* land of which Government is the owner, but which is held by a tenant under Government. It does not authorise assessment of land which as in this case has been conveyed away by Government and in which Government retains no rights as owner. Clause 4 of section 3 defines "superior holder." That definition implies that Government possesses some title to or right in the land. The superior holder is the person who has the highest title to it next after the Government. It is with that person (section 9) that the assessment is to be settled, and it is with reference to that person's rights it is to be fixed (section 8). But the Act does not contain any provision for assessing land held in freehold and in which the Government has no rights at all.

Next we say that the enhancement in this case is unreasonable. It amounts really to a confiscation of the plaintiff's property. The Revenue Judge was of opinion that he had no power to go into this question. We submit that he was wrong. The Court under section 14 can deal with any question arising on sections 8 to 13 of the Act, and the question of reasonableness of enhancement is such a question.

[CHANDAVARKAR J.:—How is that question to be dealt with by the Court?]

By taking evidence as in the case of any other question of fact. It could not have been intended to leave every landholder in Bombay absolutely at the mercy of the Collector without appeal.

The Collector necessarily acts upon the report or suggestion of some subordinate in fixing the assessment and ordering a notice of enhancement to be served. There is no inquiry into the value of the land. The landholder is not called upon or permitted to state his case. It cannot have been intended that under such circumstances the decision of the Collector should be final and that the landholder should be without redress.

Prior to Bombay Act II of 1876, the law as to land revenue in the Town and Island of Bombay was Regulation XIX of 1827. Clause 2 of section 3 of that regulation gave the Revenue Judge power to deal with the question of amount and reasonableness of assessment. Section 14 of the present Act should be construed in the same way. In the case of *Shapurji Jivanji* v. *The Collector of Bombay*,(1) Scott, J., was wrong in holding that he could not go into the question. He decided upon the authority of the Kanara case.(2) But that was a case from the mofussil and was governed by a different regulation, viz. Regulation XVII of 1827. Clause 2 of section 9 of that regulation was in that case construed to give a right of suit only when exemption from assessment was claimed. Immediately after that decision Act X of 1876 was passed, which by section 4 only permitted a civil suit in certain cases, but section 1, clause (*a*), expressly exempts the Collectorate of Bombay from the operation of that Act. Bombay Act II of 1876 was subsequently passed (October, 1876). So it is clear that the rights of the landholders in Bombay are not affected by the decision in the *Kanara case*(2) or by Act X of 1876.

Further, we submit that once an assessment is fixed upon land under section 8 of Bombay Act II of 1876, it cannot be enhanced unless it has been expressly fixed for a certain time. If no time is limited, an assessment once made by the Collector must be taken to be a permanent assessment. There is no provision in the Act giving power to enhance an assessment once fixed under section 8.

On the facts we say the Government is estopped from enhancing the assessment on the plaintiff's land. The evidence shows clearly

(1) (1885) 9 Bom. 483. (2) (1875) 12 B. H. C. R. Appendix 1.

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that the plaintiff bought the land in 1887 on the understanding that it would be assessed at the rate of nine pies per square yard only. The Collector's letter of the 25th July, 1887, stated that to be the rate, and it was upon that assurance the plaintiff paid the purchase money.

*Scolt* (acting Advocate General) and *Kirkpatrick* for the respondent (the Collector of Bombay) :—The decree of the lower Court is right. The Government has the power to enhance and the plaintiff has not shown that any specific limit to assessment has been established.

The Collector's notice of enhancement under section 8 of Bombay Act II of 1876 does not need the previous sanction of Government. When the act of the Collector requires such previous sanction, an express provision to that effect is made : see section 6, clause 3, and section 26, clause 2, of the Act. The words in section 8 "subject to the orders of Government" mean merely that the Collector, in fixing the assessment under that section, is subject to the control of Government. A subsequent sanction is sufficient.

The word "settlement" in section 9 does not imply that the Collector before fixing the assessment must consult or communicate with the landholder. By section 8 he has an absolute discretion subject only to the control of Government and his decision is final : see section 14. "Settlement with the superior holder" means that the assessment as settled or fixed by the Collector is to be charged upon the superior holder. The words do not mean a settlement "by or between" the Collector and the superior holder. By the old law regulating assessment in the mofussil (see section 40 of Regulation XVII of 1827), it was provided that the Collector before assessing land might "call upon the occupant" to show that he was entitled to exemption. There are no such words in the Bombay Act II of 1876 relating to assessment in the Island of Bombay.

Unless Government expressly surrenders its rights as to any particular land, it has a right to raise a revenue by assessing all land. The revenue is raised for public purposes and necessities. The Government alone is the judge of those necessities. As to land in the mofussil this right of Government is expressly declared in Regulation XVII of 1827, section 2, clause 2. See also the Act

now in force: Bombay Act V of 1879, section 45. As to the Island of Bombay such a declaration was unnecessary. Here the English law has applied since the cession of the island in 1660. See *Naoroji* v. *Rogers*[1] and *Lopes* v. *Lopes*.[2] As to English law, see Stephen's Blackstone (10th Ed.), Vol. 2, page 583.

The right to assess land is not limited to tenures of any particular description. See also Warden on Land Tenures in Bombay, paragraph 274, clause 10. It is not limited to lands of which Government is the owner. The words "superior holder" in Bombay Act II of 1876 do not imply that assessment can be levied only on Government land held by a tenant under or from Government. They indicate the person having the highest right to the land, but subject always to the paramount right of Government so far as assessment is concerned. The Act provides that it is upon him in the first instance that the assessment is to be levied. See also the definition of superior holder in Bombay Act V of 1879, section 3, clause 13.

It is not competent for the Civil Court to inquire into the reasonableness of the assessment. This suit is brought under section 14 of Act II of 1876. That section only permits the legality of the Collector's decision to be questioned in a suit. His decision upon all other questions is final, but it may be stayed until the question of its legality is decided. There is no law which fixes the measure of reasonableness, and no legal question can be raised on that point.

An assessment, unless declared to be made for a definite time, may be enhanced. There is nothing in the Act to forbid enhancement from time to time, and nothing to indicate that an enhancement once made is permanent. In England periodical assessments of land tax were made until a fixed rate was made perpetual by Stat. 38 Geo. III. c. 60, Stephen's Blackstone (10th Ed.), Vol. 2, page 588. As Scott, J., says in *Shapurji* v. *The Collector of Bombay*,[1] "it is not only legal but politic and just to increase assessments in accordance with the increased value of land."

As to the facts in this case, it is clear that the Government when selling the land in question in 1887 to Janardhan Gopal

(1) (1837) 4 B. H. 1 C. R. pp. 30, 31 & 36. (2) (1868) 5 B. H. C. R. 172, pp. 178-9.

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never intended to surrender its right to assess. The purchaser must be presumed to have known that by law the assessment then leviable was not permanent, but was liable to further enhancement. The case of *Shapurji* v. *The Collector of Bombay*,[1] which raised the question of the right to enhance, had been decided only a few months previously. The purchaser was then a solicitor of the High Court. The Collector's letter of the 25th July, 1887, (*supra* page 722) could not have misled him. The Government Resolution of the 11th July, 1887 (*supra* page 721) stated that the land would be subject to the usual rules of assessment. Since the date of the purchase the assessment has been paid on bills which stated that it was levied under Bombay Act II of 1876. It is under this Act the enhancement is made; so that from the first the purchaser has been aware that enhancement was possible and he has acquiesced. It was upon those terms that he acquired the land and has held it ever since.

JENKINS, C.J.:—The plaintiff in this suit seeks a declaration that there is a right on his part, in limitation of the right of Government, to hold his land, particularised in the plaint, for ever on payment of assessment at the rate of 9 pies per square yard per annum, and that Government have no right to enhance the rate. On this and other grounds he seeks to have the increased assessment that has been imposed on his land set aside. The Revenue Judge has dismissed the suit with costs, and from this decision the plaintiff has appealed to this Court.

Originally, so far as the record before us shows, the land was of the pension and tax tenure. It was, however, purchased by Government from the holder, and a part of it was granted (though no deed was executed) to certain persons for the benefit of the Free Church of Scotland Mission. At the same time the Government made a grant-in-aid of Rs. 25,000 towards the erection and establishment of a school. A school house and other buildings were in due course erected.

The character of the locality, however, rendered it desirable to move the school elsewhere, so on the 29th April, 1879, Dr. Mackichan on behalf of the Mission wrote to Mr. Peile, the

(1) (1885) 9 Bom. 348.

Secretary to Government, asking for the sanction of Government to a sale of the land. On the 24th of July, 1879, a reply was received, stating that His Excellency the Governor in Council was prepared to consent to the sale on certain terms mentioned in the letter. The second and third paragraphs of the letter are as follows:

I am directed to inform you that His Excellency the Governor in Council has favourably considered this request, and is prepared to consent to the sale on the same terms as these recently offered in disposing of a similar request made by the Diocesan Board. These terms were that, on Government being satisfied through the Public Works Department that the building to which they are invited to transfer their lien is as good a security as that in aid of the building of which their grant was originally made, the sale of the latter will be permitted.

I am to add that Government desire that the terms of sale which you contemplate may be submitted for approval and that when an offer is made for the purchase of the premises this also should be submitted for the consideration of His Excellency in Council.

On the 1st of October, 1884, an indenture was made between the Secretary of State for India in Council of the one part and certain members of the Mission (to whom I will hereafter refer as the trustees) of the other part, whereby a piece of land, being part of that now in question, was conveyed to the trustees, their heirs, and assigns for ever for the purposes and subjects to the covenants and conditions therein expressed. The deed contained provisions for the use of the building as a school, and for its proper management, and finally provided, that in certain events the piece of ground and the buildings on it should revert to Government. On the same day a lease was executed in favour of the Mission trustees of another piece of land, also part of the land now in suit for the term of one year as from the 1st of July, 1865, and so from year to year at the yearly rent of rupee one until the demise should be determined as therein provided.

On the 31st of August, 1885, Dr. Mackichan wrote to the Secretary to Government, and, after alluding to the sanction given on the 24th of July, 1879, submitted for the consideration of Government an offer that had been received from Mr. Narayan Moolji, a copy of which was annexed. The purchase price offered was Rs. 29,000, and it was stipulated that the land was not to be subject to any rates or taxes. The matter was reported on

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both by the Collector of Bombay and the Superintending Engineer, N. D., and a memorandum was furnished by the Public Works Department stating that in the circumstances it did not appear desirable to resume the land. On the 4th of March Dr. Mackichan wrote to inquire as to the decision of Government, and on the 13th of March a reply came asking for further information. It seems that besides the pieces of land comprised in the two indentures I have mentioned, there was an adjoining plot of land also in the occupation of the Mission, and on the 1st of May Dr. Mackichan by letter requested the Government of Bombay to ascertain from the Government of India on what terms this plot could be made over to the purchaser of the school property. On the 2nd of June the Collector reported that it would be worth Rs. 5,065, or Rs. 5 per square yard, if sold to the persons he indicates, and that in his opinion this might be taken as its proper valuation.

The matter was then submitted to the Government of India, who replied that they were inclined to think that the fairest arrangement would be to cause the school premises and the Government plot to be appraised as parts of one whole lot by a professional valuer, who for the purposes of valuation would take into account all the circumstances of each; that this valuation in the case of the plot should supersede the arbitrary estimate of Rs. 5 per yard; and that the Mission might be permitted to sell the whole together, paying to Government the price of the plot as valued.

Mr. Narayan Moolji's offer was for some reason withdrawn, and on the 25th of August, 1886, Mr. Janardhan Gopal made the following offer:

I have this day made an offer of Rs. 32,500 (rupees thirty-two thousand and five hundred) for the purchase of the building near French Bridge known as the Free Church Boarding School, together with the site admeasuring about 1,450 square yards belonging to the school, and also all that piece of ground admeasuring 1,011 square yards at the near or between the school site and the Railway line.

The whole property as above described admeasuring 2,461 square yards or thereabouts shall be conveyed to me as free-hold tenure or for a nominal Government tax.

The vendor shall make out a marketable title to the aforesaid property. In

the event of their inability to do so it will be at my option to complete the contract or not. The entire expense of conveying the whole property to me by the Free Church Mission as aforesaid to be borne half and half by me and the v ndors.

In case the Government refuses to sell the piece of ground admeasuring 1,011 square yards for Rs. 5 per square yard the writing to fall through.

If the final conveyance is not executed within (4) four months from this date, it shall be at my option to make myself free from the contract.

The final conveyance should be executed by all the proper parties.

This contract is effected through Messrs. Sorabsha and Company, and they shall be entitled on completion of the purchase, but not otherwise, to their brokerage at two per cent. on the purchase-money from the purchaser and two per cent. from the vendors.

On the same day this offer was accepted on behalf of the Mission.

On the 6th of September a Government Resolution was published, which, after referring to the letter of the 31st of August, 1885, and the letter of the Government of India and to the intervening events I have narrated, proceeded: "To be communicated to the Collector of Bombay, with a request that he will carry out the instructions of Government of India in consultation with the Public Works Department and the Secretary to the Free Church Mission." A copy of this Resolution was forwarded to the Mission. Mr. Campbell, Architect and Surveyor, then, on instructions from the Collector, inspected the property, and reported as follows:

Having been requested by the Collector of Bombay in his letter No. 2280 of 20th November, 1886, to value the property of the Free Church Mission at the foot of French Bridge consisting of 1,544 square yards and a two-storeyed school-house building on same and also the piece of ground at back of the above premises to the west between same and the B. B. & C. I. Railway, which is now held by the Free Church Mission from the Government at a nominal rent of Re. 1 per annum and consists of 1,011 square yards of land without any erection on same.

I have carefully inspected both plots of land and found that the plot containing 1,484 square yards belonging to the Free Church Mission fronts on the east side of Breach Candy Road, while on the south side it is shut in by the high-level French Bridge, on the west by the plot of land held by the Free Church Mission at a nominal yearly rent of Re. 1 per annum, and on the north side by the property of Keshowjee Madhowjee.

The plot to the west between same and the Railway line containing 1,011 square yards is enclosed on the south side and partly on the west by the French

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(high level) Bridge and partly on the west by the B. B. & C. I. Railway line, on the east by the Free Church Mission property, and on the north by two properties belonging to Keshowjee Madhowjee and Babaji Gopal. At present there is no access to this plot of land except through the Free Church Mission compound.

There are only three properties to which this plot of land could be of any possible use, viz. the Free Church Mission, Keshowjee Madhowjee and Babaj Gopal's, which two latter abut upon it on the north side, and under these circumstances the plot can hardly be said to have any market value as it would be of no use at all except to one of the three parties whose properties surround it.

I find that a piece of waste land a little further on northwards, bounded on the west side by the Railway, and abutting on Mr. Babaji Gopal's land, and to which there is access by a road running out of Breach Candy Road, was sold to him by the Collector at Rs. 3 per square yard, and I am of opinion that under the circumstances half this rate or Re. 1-8-0 per square yard will be a fair rate to allow for the plot of 1,011 square yards at the back of the Free Church Mission property to the west between same and the B. B. & C. I. Railway.

| | | |
|---|---|---|
| The present value of the school building itself I take at | Rs. | 23,000 |
| 1,484 square yards I value at Rs. 5 per square yard ... | ,, | 7,420 |
| The land at back of above ground to the west and between same and the Railway, 1,011 square yards, I value at Re. 1-8-0 per square yard ... ... ... | ,, | 1,516 |
| Making a total o ... | Rs. | 31,936 |

This report was forwarded to Government by the Collector with a request for early instructions, and on the 18th of December was published a Government Resolution that "the land should now be sold in accordance with the instructions of the Government of India in their letter No. 228 of 31st July last embodied in Government Resolution No. 1420 of September, 1886, the Free Church Mission paying the price of the plot as valued." A copy of this Resolution was forwarded to the Mission.

On the 15th January, 1887, Dr. Mackichan wrote to the Acting Secretary to Government as follows:

In continuation of our correspondence with reference to the sale of the Free Church Boarding School, Girgaum, I have the honour to state that the Free Church Mission on receiving the Government Resolution in the Educational Department sanctioning the sale of the piece of ground in the rear of the school to the Mission at Rs. 1-8-0 per square yard according to the rate fixed by the professional valuators, agreed to accept the offer of Mr. Janardhan Gopal, who has agreed to pay Rs. 32,500 for the whole property including the piece of

ground behind the school, for which the sum of Rs. 1,516-8-0 is to be paid by us to Government.

This piece of ground is now being transferred to us and the sum stated is being paid. I have now to request that Government will be pleased to sanction the sale of the building to the abovenamed purchaser and take the necessary steps to transfer the property, releasing it from the lien which at present rests upon it as a building erected for educational purposes.

The present lien of Government is to be transferred to other premises which we may acquire for the school, and I have the honour to request that in determining this lien Government may be pleased to fix it at Rs. 30,000 instead of Rs. 32,500 as formerly estimated, in view of the fact that the net proceeds of the most favourable offer which we can obtain will not aggregate more than Rs. 30,000.

On the 26th January, 1887, the Solicitor to Government wrote to the Under Secretary to Government, Public Works Department, but his letter has no material bearing on the case except so far as it is therein stated that "the trustees of the Free Church Mission have with *the assent of Government* sold both properties for Rs. 32,500." On the 11th February, 1887, Messrs. Ardeshir Hormasji and Dinshaw, who were acting as Solicitors both for the purchaser and the Mission, submitted to the Collector for the approval of Government two draft conveyances, one being an assurance to the trustees of the land not previously conveyed to them, and the other being a conveyance by the trustees to Mr. Janardhan Gopal of all the school premises.

On the 15th February, 1887, the following Government Resolution was published:

The correspondence should be sent to the Director of Public Instruction with a request that he will, after consultation with the Secretary, Free Church Mission, and, if necessary, the Solicitor to Government, report to Government the proceedings necessary to carry out the transfer of the Government lien to the new property of the Mission.

Copy of these orders should be sent to the Secretary with copy of the letter of the Government Solicitor that the conveyance may be prepared as advised in Mr. Little's paragraph 4.

A copy of this Resolution was forwarded to the Mission. On the 28th February, 1887, the draft conveyances were returned with certain alterations. These drafts have unfortunately been lost, but from the letter of the 19th March, 1887 (Exhibit V), it appears that the alterations were to the effect that the property

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should be subject to taxes, assessments, &c. In this letter it was stated by the purchaser's attorneys that it had been understood at a previous interview with the Collector that the alteration had reference only to municipal taxes, and it was proposed the alterations should be so modified as to make this clear by express mention, and to exclude Government rights also by express mention. The drafts were modified by Messrs. Ardeshir and Co. accordingly.

On the 31st May, 1887, the Secretary to Government wrote to Dr. Mackichan: "I am to add that in the absence of any order of Government sanctioning the conveyance of the land to Mr. Janardhan Gopal free of liability to assessment to the land revenue, the Solicitor to Government has rightly assumed that no such exemption was contemplated." Thereupon Dr. Mackichan wrote on the 21st June, 1887, to Government as follows:

With reference to your letter No. 894 of 1887 regarding the sale of the Free Church Boarding School near the French Bridge, Girgaum, I have the honour to state that a provisional agreement was come to in August last between the trustees of the Free Church Mission and Mr. Janardhan Gopal, and that it has been with a view to the completion of this agreement that questions concerning the property have been since that date before the Government of India and Bombay.

It was not the understanding or intention of the Mission that the agreement was binding on Government. And neither the Mission nor the purchaser expected a complete exemption of the land referred to in the agreement from assessment to land revenue. What the Solicitors, Messrs. Ardeshir Hormasji and Dinshaw, point out is that the price offered by the purchaser, viz. Rs. 32,500 for the property, was on the understanding expressed in the agreement for sale that the purchaser would not be required to pay to Government more than a nominal Government tax. We understand that what the purchaser asks is that the amount charged may not exceed what is payable in respect of land of Pension and Tax tenure in the locality.

Having regard to the fact (1) that the piece of land containing 1,484 square yards has been held by them free from assessment to land revenue and (2) that they pay only one rupee per annum on account of the vacant land, the trustees believe that even in the event of the sale of the same and the consequent change in the ownership of it, Government would not place a heavy assessment on it, that at any rate they would not assess it in excess of what the land was subject to before it was let to the Mission or of what Pension and Tax land in its neighbourhood is liable to pay.

It is the earnest desire of the Mission that this contract be completed.

Under the circumstances we hope that Government will be good enough to state or ask the Collector of Land Revenue to say what the land will be assessed at for purposes of the land revenue, it being assumed that the land was of the Pension and Tax tenure. The completion of the sale depends on the determination of this question, as also on the question whether a small piece of land which though not included in the original grant has been used as a portion of the school premises (which question is already the subject of correspondence between Messrs. Ardeshir Hormasji and Dinshaw and the Collector) shall be included in the sale to Mr. Janardhan, and I have to state that the Mission will feel greatly obliged to Government for an early disposal of the matter.

On the 29th of June, 1887, the drafts were returned to Messrs. Ardeshir & Co.

On the 11th July, 1887, a Resolution of Government in reference to the letter of the 21st June was published. The Resolution runs:

It, of course, does not follow that because Government allowed the land to be free of assessment or to be assessed at only a nominal amount as long as it was occupied for the purposes of an educational institution they will continue that exemption when the land passes for other purposes into other hands. It would not be fair to the general taxpayers for Government to do so.

The land in question will be liable in the purchaser, Mr. Janardhan Gopal's hands, to be assessed under the rules ordinarily applicable to land of the same description. The Collector should be desired on the application of either the Secretary of the Free Church Mission, or of the purchaser, Mr. Janardhan Gopal, to state what the assessment of the land revenue will be and what are the rules affecting the amount of the assessment, and the Secretary should be informed that the Collector has been so desired.

Acting on this Resolution Messrs. Ardeshir Hormusji & Co. on the 14th July 1887 wrote to the Collector:

In a letter addressed by the Acting Chief Secretary to Government to the Secretary, Free Church Mission, in reference to the claim for exemption from land revenue made by the purchaser of the above property, the latter has been informed that you had been requested on the application either of the Free Church Mission or the purchaser, Mr. Janardhan Gopal, to state what the assessment of the land revenue will be and what are the rules affecting the amount of the assessment. We have therefore, as attorneys for both the Mission and the purchaser, to request that you will be so good as to furnish us with the desired information.

We understand that the whole of the land was of the Pension and Tax tenure prior to its having been taken over by Government for the purpose of the Mission school.

On the 25th July, 1889, the Collector replied:

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In reply to your letter of 14th instant on the subject of the assessment of the land occupied by the Girgaum Mission school, I have the honour to inform you that the land will be assessed at the rate of 9 pies per square yard per annum. This is the rate of assessment which is charged for Government land in this locality in accordance with a scale of varying rates in different localities which was laid down by Mr. Jacomb when Collector and which has been followed for the last six years.

The fact that the land was of the Pension and Tax tenure before it was taken up by Government does not affect the assessment now to be levied as the Pension and Tax tenure ceased when the land was bought up by Government.

On the 20th December, 1887, an indenture was executed to which the Secretary of State for India in Council as representing the Government was a party of the one part and the trustees of the Mission of the other part. It was thereby recited that the trustees with the approval of Government had resolved to sell the pieces of land therein comprised, and that the Government with a view to facilitating the sale had agreed to grant to the trustees all their reversion and estate in the premises, and that the trustees had agreed with Janardhan Gopal for the absolute sale to him of the pieces of land. In the operative part the Government granted all their reversion and estate in the pieces of land to the trustees, their heirs, executors, administrators and assigns for ever, but subject to the payment of taxes, rates, charges, assessments leviable or chargeable in respect of the premises or anything for the time being thereon. Then followed a covenant by the Secretary of State that the premises should at all times remain and be to the use of the trustees, their heirs and assigns and be quietly entered into and upon and held and enjoyed and the rents and profits thereof received by them accordingly without any lawful eviction, in eruption, claim or demand whatsoever from or by the Secretary of State or any person claiming through or in trust for him.

On the 16th January, 1888, the conveyance to the purchaser, Mr. Janardhan Gopal, was executed. The parties to it were the trustees of the Mission of the first part, the Secretary of State of the second part and Mr. Janardhan Gopal of the third part. After reciting that the trustees had entered into an agreement with Mr. Janardhan Gopal for the *absolute sale* of the pieces of land, the trustees with the knowledge and consent of Government

conveyed the same to Mr. Janardhan Gopal, his heirs, executors, administrators, and assigns for ever subject to the payment of all rates, taxes, charges, assessments leviable or chargeable in respect of the premises or anything for the time being thereon. And the Secretary of State did thereby for himself and his successors acquit, release and for ever discharge Janardhan Gopal, his heirs, executors, administrators, and assigns of and from all manner of rights, powers, authorities and privileges to him and his successors reserved in respect of the premises thereinbefore firstly described in and by the indenture of the 1st of October 1884 and from all conditions, limitations and obligations by the said indenture imposed upon the use and enjoyment of the premises.

In 1893 the property became vested under a partition in the plaintiff Mr. Janardhan Gopal's son. Up to 1899 the assessment of nine pies per square yard was paid, but on the 24th of August in that year the Collector of Bombay wrote to the plaintiff:

I hereby on behalf of Government give you notice that, under section 8 of Bombay Act II of 1876, I have fixed the assessment for land revenue for marginally noted land in your possession at Re. 0-6-6 annas six and pies six per square yard per annum. This assessment will come into force on 1st October, 1899, and is guaranteed for fifty years from that date.

Locality Girgaum; area of land 3,072 sq. yards; Collector's new No. 16912.
New Survey No. 1-2 & 3 / 7962.

This was done without any inquiry of Mr. Janardhan as to the circumstances under which the property was acquired from Government, without even a word of warning, and the result was that having regard to the terms of the Bombay City Land Revenue Act the only course open to the plaintiff was at once to commence this suit, and that he did on the 26th of September, 1899.

On the 6th January, 1900, a Resolution of Government was published ratifying what the Collector had done.

It has been urged before us, and not without reason, that the action of the Collector in increasing the assessment to about nine times its original amount practically comes to a confiscation. Mr. Janardhan has stated the result in his evidence as follows:

If 9 pies per square yard would be Rs. 144 per annum, this sum capitalized

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would at 20 years' purchase, make 3,000 or at 25 years' purchase Rs. 3,500 addition to the purchase-money. I had this in my mind at the time. Government have now increased the assessment to 6 annas and 6 pies per square yard which represents Rs. 1,248-6-0 per annum; that sum capitalized at 25 years' purchase comes to Rs. 31,200. If this assessment holds good my property will be lessened in value by Rs. 31,000 or rather the difference between Rs. 31,200 and 3,500. The maximum rent of the property is Rs. 150 mensem, and after paying taxes of Rs. 104 per mensem it would leave a rent of Rs. 46 per mensem, and then calculating with the municipal rates and taxes and money expended on repairs at 10 per cent. there would be nothing left over. A little to the bad. Had I known this I would not have purchased the property. I have spent Rs. 14,000 more on the property and now only produce Rs. 150 as rent.

Before us it has been urged (1) that the action of the Collector was invalid as he did not obtain the previous sanction of Government: (2) that there was no such settlement as is required by section 9 of the Act: (3) that the plaintiff is not a superior holder and therefore does not come within the operation of the Act: (4) that the assessment is unreasonable and therefore open to revision: and (5) that a specific limit to enhancement has been established and preserved. In support of the first two contentions it has been urged with great force that unless some such limitation is imposed as the arguments imply, the Collector is clothed with an arbitrary power which it is difficult to suppose the Legislature intended to vest in him.

In the view, however, that I take of the case it is unnecessary to deal with these points, for I think on the merits there is a valid objection to what the Collector has done.

I have set out at length the history of the case, but it will be convenient here to recapitulate briefly the salient facts. One plot of land was conveyed to the Mission trustees, "their heirs and assigns for ever" subject no doubt to a right of resumption, but without any mention of assessment. Resumption in the opinion of the Public Works Department was undesirable and in the conveyance to Mr. Janardhan the right was renounced in his favour. The other two plots of land were also conveyed to the Mission trustees, "their heirs, executors, administrators and assigns for ever," but in this case it was expressed to be "subject to the payment of all taxes, rates, charges, and assessments leviable or chargeable in respect of the premises or anything for the time

being thereon." These words appear also in the conveyance to Mr. Janardhan, the assurance to whom is expressed to be to him, "his heirs, executors, administrators and assigns for ever."

We are then met with the question, what assessments are leviable or chargeable in respect of the premises? When Mr. Janardhan sought information on this point prior to the completion of the purchase, he was referred by Government to the Collector, by whom he was told that the land would be assessed at the rate of 9 pies per square yard. Though the Collector was requested to state not only what the assessment would be, but also what were the rules affecting the amount of the assessment, he never so much as hinted that there would be a right to enhance in the future. But this silence, the defendant now suggests, practically amounted to a reservation of that right. I could understand that suggestion, had Mr. Janardhan been taking the premises as an occupant or a tenant from year to year, but it appears to me unreasonable in relation to a purchase out-and-out of the property for its full value; and here it must be remembered that Government took an expert opinion as to the value and learnt from it that Mr. Janardhan was paying for the property at its full value. Surely to such a purchaser the intention to reserve the right to enhance assessment should in all fairness have been clearly disclosed, and I cannot bring myself to believe that Government or the Collector were acting in the disingenuous manner that the defendant's counsel would now have us ascribe to them. It is in my opinion beside the point to cite the maxim that a man must be taken to know the law. Government undoubtedly had the power to fix the amount of assessment, and the only question here is whether it did not do so, and that is not a matter within the maxim. I think the meaning that a reasonable man would under the circumstances ascribe to the Collector's reply is that a specific limit of 9 pies per square yard per annum was established within the meaning of section 8 of the Act. If that be so, are not the Government and the Collector now bound? If the Government be bound, there can be no question that the Collector is: this was not disputed in the argument. But whether it be put on the ground of collateral contract or of estoppel it seems to me Government

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is bound. There was ample consideration to support a contract fixing the assessment permanently; for the Government not only received Rs. 2,383-8-0, but the balance of Rs. 30,616 went to furnish security to Government for the amount advanced as a grant-in-aid. While if the matter be regarded from the point of view of estoppel the legal result is the same. In my opinion the conduct of Government, coupled with the statement of the Collector made on their behalf for the purposes of the purchase, was, under the circumstances, such as to create and encourage in the purchaser as a reasonable man the belief that he was purchasing property substantially worth Rs. 33,000, and that Government were not silently reserving to themselves an unfettered right to destroy the value of that property and practically to confiscate that which had been sold.

The facts appear to me to bring the case within section 115 of the Evidence Act. If the defendants' counsel are right in their contention, then it was open to the Collector on the very next day to raise the assessment to the figure at which he now has purported to fix it, or even to a greater amount. Such a conclusion appears to me to be opposed to what is reasonable, to what is probable, and to what is fair. That such an idea never entered the purchaser's mind is clear from the fact that he not only completed the sale paying full value for the property (and by that I mean its value unincumbered), but has also since spent Rs. 14,000 on it. On this point we have, too, the clear evidence of the plaintiff's father, Mr. Janardhan, to which I have already referred, and on which I do not hesitate to rely, and I can only attribute to Government the knowledge that Mr. Janardhan completed the sale in the belief induced by the Collector's letter that the specific limit of his liability in respect of land assessment was 9 pies per square yard.

It has been argued that as Government is concerned we should apply a different canon of interpretation to their words and act, and construe them adversely to the grantee. Even supposing this rule to have any place in a transaction such as the present, it would not, in the view I take, alter my conclusion. In my opinion, therefore, the decree of the Revenue Judge should be reversed, and a decree passed in the plaintiff's favour in the

terms of the first part of paragraph (*a*) of the prayer of his plaint, and the enhancement should be set aside. The plaintiff should get his costs throughout.

CHANDAVARKAR, J.:—I am of the same opinion. The facts have been fully set out in the judgment just delivered by my Lord, and I will not recapitulate them. The question as to the right of Government to increase the assessment of the land to the land revenue must turn upon the intention of the parties —upon what in fact was in their contemplation when they entered into the contract.

At the outset we have the fact that this was an out-and-out sale by Government to the plaintiff's father, Mr. Janardhan Gopal, of all their rights as proprietors, subject, indeed, to the payment by him and those claiming under him of "all taxes, rates, charges, assessments, leviable or chargeable" in respect of the premises sold "or anything for the time being thereon." In other words, it was not a mere transfer of occupancy rights—where Government without parting with their property in the soil let the land for certain defined purposes on certain conditions for a prescribed number of years and the transferee does not become its owner but a mere "occupant" or "tenant"—a term well understood by lawyers.

Now, while the negotiations for the sale of the land to Mr. Janardhan Gopal were going on, he proposed that Government should sell the property either free of assessment or for a nominal Government tax. Government would not agree to that, but said:—"The land in question will be liable in the purchaser Mr. Janardhan Gopal's hands to be assessed under the rules ordinarily applicable to land of the same description." They did not make clear what they meant by "land of the same description." From the previous correspondence it would appear that both Mr. Janardhan Gopal and his immediate vendors—the Free Church Mission—had at first assumed that the land forming the subject of the sale was of the Pension and Tax tenure, but it was subsequently pointed out to them by the Collector that the assumption was erroneous. In other words, Government treated it as land absolutely vested in them which they could

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dispose of as they liked under section 25 of Bombay Act II of 1876. Moreover, Government referred to certain rules. It has, however, been conceded at the Bar that as a matter of fact there were no rules. Had there been any rules and had those rules, brought to the notice of the purchaser, provided that the assessment to the land revenue was liable to be enhanced at the discretion of Government, the property would have, after the purchase, become liable in his hands to such enhancement. From the words above quoted, therefore, no irresistible inference arises that Government intended to tell the purchaser that the sale was to be subject to the liability on his part of paying enhanced assessment whenever Government should choose to enhance it. Had that been their intention they would have said so in clear terms.

But it was urged that though there were no rules and though Government did not in so many words say that the purchaser was to take the land subject to the right of Government to assess it to the land revenue from time to time according to their discretion, the purchaser was well aware of that right and in the absence of any waiver of it by Government he must be taken to have bought the property subject to that right. But because he knew that, was he bound to assume that Government intended to reserve to themselves that right without any limit in an out-and-out sale in the absence of clear and unmistakeable language conveying that intention, especially when the land was fully valued and he was paying the full price of the property of both the land and the buildings thereon? They were owners of the property and could dispose of it in such manner as they thought fit under section 25 of Bombay Act II of 1876. They could propose any terms they liked to the purchaser restricting his right, and if he accepted them he would be bound, provided those restrictive terms, cutting down the proprietary title they were granting, were worded in language reasonably and sufficiently clear. As observed by Knight Bruce, V.C., in *Seaton* v. *Mapp*,[1] "When a vendor sells property under stipulations which are against common right, and places the purchaser in a position less advantageous than that in which he

(1) (1846) 2 Coll. 556.

otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself." Now, here Government tell the purchaser that he will be liable to pay the assessment under the rules "ordinarily applicable to land of the same description." That in itself leaves the matter ambiguous at the best. But assuming that we should construe it in favour of Government, what followed does not show that Government intended to reserve to themselves the right of enhancing the assessment at their discretion. The intention to be gathered from it seems rather to have been to fix the assessment once for all without any condition of variation. After saying that the land will be liable as above stated, Government desire the Collector "to state what the assessment of the land to the land revenue will be" and what the rules are for fixing its amount. If Government intended to hold the purchaser responsible for an assessment liable to be enhanced at any time at their discretion, where was the necessity of ascertaining the amount *then*, when they could have simply said in plain terms that he must take it subject to their paramount right to assess it to the land revenue whenever they chose?

The Collector, in accordance with the directions of Government, informed the purchaser that the land could not be treated as of the Pension and Tax tenure as it had become vested in Government and that it "will be assessed at the rate of 9 pies per square yard per annum." Neither the Collector nor Government said a word at any time during these negotiations that the amount so fixed was liable to be increased. What should the purchaser understand from all that? To any reasonable man not accustomed to the subtle refinements of a lawyer, and looking at the transaction from a common sense point of view, the whole transaction must, I think, be clear as one in which Government virtually said to the purchaser: "You ask us to sell this land either free of assessment or for a nominal Government tax. We are not willing to do that; but we sell all our rights in this property which is vested in us, subject to the payment by you as

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assessment of 9 pies per square yard per annum." That would be the construction put upon it had it been a contract between one private individual and another, and the vendor in that case who, after the purchaser had accepted those terms and the sale had been completed, claimed more than 9 pies would be at once out of Court on the ground that he had not clearly stipulated for that. Why should a different principle apply because one of the contracting parties selling the property as his happens to be Government? As held by Sargent, C.J., in *The Secretary of State for India* v. *Sheth Jeshingbhai Hathising*,(1) where an agreement is effected by way of proposal and acceptance between Government and a private individual, it "is subject to the ordinary rules applicable to contracts." It was indeed contended both by the learned Advocate-General and Mr. Kirkpatrick, who argued the case for Government, that a different rule of construction should apply here because here it is a grant from the Crown, and certain observations of Westropp, C.J., in the *Kanara Land case* (*Vyakunta Bapuji* v. *The Government of Bombay*,(2)) were relied upon. But those were observations made with reference to a case in which the right of Government to enhance the assessment to the land revenue of land held by occupancy tenants under the *ryotwari* tenure was in dispute. It was not a case of a contract of an out-and-out sale by Government of land vested in them as proprietors. On the other hand, in the *Conservator of Forests* v. *Nagardas*(3) the rule of construction adopted by Westropp, C.J., was that "upon a question of the meaning of words, the same rules of common sense and justice must apply, whether the subject-matter of construction be a grant from the Crown or from a subject," and that "it is always a question of intention to be collected from the language used with reference to the surrounding circumstances." Fulton, J., followed the same rule in *Re Antaji Keshav Tambe*.(4)

Here it appears to me that when we have regard to the nature of the transaction, viz., that Government was selling the roperty out-and-out as any private proprietor—when we look to

(1) (1892) 17 Bom. 407.
(2) (1875) 12 Bom. H. C. App. 1.
(3) P. J. for 1875, 230.
(4) (1893) 18 Bom. 670.

the whole of the language used and the acts done in accordance with it during the negotiations, to the intimation conveyed to the purchaser that the land would be assessed at the rate of 9 pies per square yard per annum without any warning that that amount was liable to be enhanced and to the fact that upon the faith of it all he paid Rs. 32,500 as its price after both the land and the buildings had been fully valued by Government and their price fixed in accordance with that valuation, the intention of the parties upon a reasonable construction must be taken to have been that the purchaser was to be liable to pay the amount of 9 pies per square yard per annum then levied as assessment and no more. To hold otherwise would be to say that in purporting to sell their property to the purchaser as they did Government intended without using apt language to express that intention to reserve to themselves the right to turn round at any time afterwards—perhaps the very next day after the sale—and so enhance the assessment as to practically nullify the purchase and confiscate the property. I do not think we should draw the inference of any such intention in the absence of clear evidence.

The understanding, then, of the parties was that the purchaser should be clothed with all the proprietary rights of Government subject to the payment by him and those taking under him of 9 pies per square yard per annum as assessment to the land revenue. It is with reference to that understanding that the deed of sale between the parties must be construed. When that deed says that the property was sold "subject to the payment of all taxes, rates, charges, assessments leviable or chargeable," it leaves the question open as to what the taxes &c. are which are "leviable or chargeable." Extrinsic evidence of that is admissible, for it neither contradicts nor varies the terms of the deed, but explains the sense in which the parties understood the words of the deed, which, taken by themselves, are capable of explanation: see *Bank of New Zealand* v. *Simpson*.[1] The understanding in question furnishes that evidence. It is also evidence of a collateral agreement outside the deed of sale, admissible as the deed itself does not express the whole of the terms regarding the taxes &c.

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which are "leviable or chargeable": see *De Lassalle* v. *Guildford*.(1)

In this view of the case the other points which have been argued do not arise, and I concur both in the judgment delivered and the decree proposed by my Lord.

*Decree reversed.*

Attorneys for the plaintiff—*Messrs. Ardeshir, Hormasji, Dinsha & Co.*

Attorney for the defendant—*Mr. E. F. Nicholson*, Government Solicitor.

(1) (1901) 2 K. B. 215.

## APPELLATE CIVIL.

*Before Sir L. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.*

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*July 31, August 7 and 14.*

JETHABHOY RUTTONSEY (ORIGINAL PLAINTIFF), APPELLANT, *v.* COLLECTOR OF BOMBAY (ORIGINAL DEFENDANT), RESPONDENT.*

*Land Revenue in Bombay—Assessment—Enhancement of assessment—Bombay Act II of 1876—Purchase of land from Government—Encroachment—Acquisition of land under section 26 of Bombay Act II of 1876—Vendor and purchaser—Estoppel.*

The plaintiff was the owner of certain land in Bombay consisting of three separate plots which had been bought from Government at different times. Plot No. 1 had been bought by the plaintiff's father in 1880, to whom the Collector of Bombay, with the sanction of Government, had sold it at "the rate of Re. 1 a square yard and ground rent at 30 pies per *burga* of 60 square yards per annum." Plot No. 2 was acquired by encroachment, and was sold in 1884 to the plaintiff's father by the Collector under clause 2 of section 26 of Bombay Act II of 1876, five times the value of the land being paid and assessment being charged as provided by that section. Plot No. 3 was bought in 1885 for the sum of Rs. 208-14-3, the rate of valuation being stated as "Re. 1 per square yard and rent at 30 pies per *burga* of 60 square yards."

Assessment was duly paid at the rates originally agreed until 1899. In August of that year the Collector served the plaintiff with a notice enhancing the assessment to three annas per square yard per annum. The plaintiff thereupon filed

* Revenue Suit No. 21 of 1899; Appeal No. 13 of 1901.

this suit under section 14 of Bombay Act II of 1876. The Revenue Judge dismissed the suit with costs. On appeal,

*Held*, reversing the decree that the Government had no right to enhance the assessment. The sale of plot No. 1 was expressly stated to be at a ground rent of 30 pies per *burga*, and this established a specific limit to the assessment. Plot No. 2 was sold by the Collector under section 26 of Bombay Act II of 1876, and the Collector having charged the maximum price and imposed the maximum assessment without reserving to himself any right could not now enhance the assessment. As to plot No. 3, the reasonable inference from the known facts was that the limit was fixed as in the case of plot No. 1.

APPEAL from the decision of the Revenue Judge, W. Webb, Esq., Acting Chief Presidency Magistrate.

By a notice dated the 18th August, 1899, but served on the plaintiff on the 30th August, 1899, the Collector of Bombay, under section 8 of Bombay Act II of 1876, gave the plaintiff notice that he had fixed the assessment for land revenue payable by the plaintiff in respect of certain land belonging to the plaintiff, consisting of 944½ square yards, situate at Mahálaxmi in Bombay at three annas per square yard per annum, such assessment to come into force on 1st October, 1899, and to be guaranteed for thirty years from that date. The assessment on the said land up to that time had been at the rate of thirty pies per *burga* of sixty square yards.

The plaintiff immediately (on the 29th September, 1899) filed this suit in the Court of the Revenue Judge of Bombay under section 14 of Bombay Act II of 1876, contesting the legality of the assessment.

On the 17th October, 1900, the Revenue Judge dismissed the plaintiff's suit with costs. The plaintiff now appealed.

The land in question consisted of three plots which had been acquired at different times.

Plot No. 1 was bought by the plaintiff's father (Ruttonsey Khimjee) in 1880 from Government. On the 3rd May, 1880, he addressed the following letter to the Collector offering to purchase and reclaim it.

To H. E. JACOMB, Esquire, Collector of Bombay.

Sir,—I wish to reclaim a piece of sea ground to the westward of my bungalow at Breach Candy, Warden Road, No. 92, as shown by pink colour in the accompanying plan and request that you will be pleased to grant me the necessary

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permission on payment of usual valuation for the ground. I may further state that the reclamation is not likely to interfere with any public or private interests.

(Signed) RUTTONSEY KHIMJEE.

On the 13th August, 1880, the Collector wrote as follows to Government requesting its sanction to the sale of the land:

*13th August, 1880.*

To J. NUGENT, Esquire, Acting Secretary to Government,

Revenue Department.

Sir,—I have the honour to inform you that Mr. Ruttonsey Khimjee has applied to me for permission to reclaim a piece of Government waste land at Warden Road, near his bungalow, containing 701 square yards and coloured pink on the accompanying tracing, and to request you will be good enough to obtain the sanction of Government to my selling the land to Mr. Ruttonsey at the rate of rupee one a square yard and ground-rent at (30) thirty pies per burga of sixty square yards per annum.

2. A reference was made by me to the Public Works Department, the Consulting Engineer for Railways and the Municipal Commissioner, and they have stated that the land is not required by them.

(Signed) H. E. JACOMB, Collector.

On the 1st September, 1880, the Government finally sanctioned the sale by the following Resolution:

No. 4593.

REVENUE DEPARTMENT.

Bombay Castle, 1st September, 1880.

Letter from the Collector of Bombay, No. 1259, dated 13th August, 1880, reporting that Mr. Ruttonsey Khimjee has applied to him for permission to reclaim a piece of Government sea land at Warden Road, near his bungalow, containing 701 square yards, and requesting sanction to his selling the land to Mr. Ruttonsey at the rate of rupee one a square yard and ground-rent at 30 pies per burga of sixty square yards per annum, the Public Works Department, the Consulting Engineer for Railways and the Municipal Commissioner to whom a reference was made having intimated that the land is not required by them.

RESOLUTION.—Sanctioned.

(Signed) J. NUGENT, Acting Secretary to Govt.

On the 9th September, 1880, the Collector communicated the sanction to Mr. Ruttonsey Khimjee as follows:

Sir,—With reference to your letter dated 3rd May, 1880, I have the honour to inform you that Government have, in their Resolution No. 4593, dated 1st instant, Revenue Department, sanctioned the sale of the land at Warden Road applied for by you at the rate of one rupee a square yard and ground-rent at 30 pies per burga of sixty square yards per annum. I therefore request you will

be good enough to send me the sum of Rs. 701 on account of 701 square yards of land in question. On receipt of the money a surveyor will be sent from this office to make over the land to you.

The price was duly paid by Ruttonsey Khimjee, and he took possession of the land.

Plot 2, consisting of 34$\frac{4}{9}$ square yards, was acquired by plaintiff's father as follows:—He had erected certain steps and a projecting gallery from his house, which constituted an encroachment over the Government land. He was called upon to remove this encroachment in November, 1883, but failing to do so, the Collector, under clause 2 of section 26 of Bombay Act II of 1876, charged him with five times the value of the land and fixed an assessment upon it of five times the ordinary annual land revenue. This sum was paid on the 22nd January, 1884, and the land was thereupon entered in the Collector's record in the name of Ruttonsey Khimji.

The following was the receipt given for the money:

| | Rs. | a. | p. |
|---|---|---|---|
| Receipt No. 497 for Rs. 171-9-0, viz., on account of valuation for the encroached land at Mahaluxmi containing 34$\frac{4}{9}$ square yards at Rs. 5 per square yard as five times, single rate, being one rupee per square yard ... ... ... ... ... | 171 | 1 | 0 |
| Rent for ditto at 12 annas and 6 pies per square burga per annum as five times, single rate, being 30 pies per burga of sixty square yards per annum for 1883-84 ... ... ... | 0 | 7 | 0 |
| | 171 | 9 | 0 |

Paid for realization on the 22nd January 1884.

(Signed) J. H. GRANT, Collector.

Rupees 171-9-0 received and credited on 24th January 1884.

(Signed) J. H. GRANT, Collector.

Plot No. 3 consisted of 208$\frac{8}{9}$ square yards. On the 14th February, 1885, Ruttonsey Khimjee wrote to the Collector as follows, proposing to purchase it:

Sir,—I beg most respectfully to inform your honour that you will be good enough to grant me on payment of your usual valuation, as you have granted me once before, a piece of Government sea land about 100 by 5 feet at Mahálaxmi.

In granting this request I shall feel highly obliged.

(Signed) RUTTONSEY KHIMJEE.

On the 2nd May, 1885, a report was made to the Collector by his surveyor as to this plot, which stated:—"It is a portion 208$\frac{8}{9}$

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square yards) of the sea land. Rate of valuation is rupee one per square yard and rental thirty pies per burga of sixty yards."

On the 8th May, 1885, the sum of Rs. 208-14-3 was paid by Ruttonsey Khimjee to the Collector, and the following receipt was given:

Rupees 208-14-3 on account of valuation of a piece of vacant ground at Warden Road containing 208$\frac{3}{4}$ square yards at one rupee per square yard assessed under section 8 of Act II of 1876, received and credited on the 8th May, 1885.

(Signed) J. H. GRANT, Collector.

Possession of the land was then given to Ruttonsey Khimjee.

Upon the land acquired as above stated assessment had been paid at the rates mentioned up to the time of the receipt of the above mentioned Collector's notice of enhancement dated 18th August, 1899.

The plaintiff in his plaint alleged that he had a right in limitation of the right of Government to hold the said land at the said fixed and uniform ground-rent or assessment, and he contended that Government had no right to increase such ground-rent or to exceed such assessment, and he prayed for a declaration to that effect, and that the order enhancing the said assessment might be cancelled.

At the hearing before the Revenue Judge the following issues were raised:

1. Whether the plaintiff is not barred by limitation from seeking any inquiry into the original assessment of the said land in the plaint mentioned.

2. Whether the Government guaranteed the assessment or the ground-rent originally fixed should continue for ever or for any fixed time.

3. Whether the plaintiff has any right in limitation of the right of Government to hold the said land at the amount of the assessment or ground-rent at which he has hitherto paid.

4. Whether the plaintiff has any right in limitation of the right of Government to assess the said land at the rate now claimed.

5. Whether the plaintiff has not a right in limitation of the right of Government to hold 701 square yards, a portion of the land in the plaint mentioned, at the fixed ground-rent of thirty pies per burga of sixty square yards.

6. Whether the plaintiff is not entitled as to the remainder of his said land to hold the same at the specific limit of assessment or rent he has hitherto paid.

7. Whether the notice by the Collector, dated 18th August, 1899, was issued under the orders or with the authority of Government.

8. If not, whether such notice is not illegal.

9. Whether the plaintiff is entitled to the relief prayed for or any part thereof.

*Rivett-Carnac* for plaintiff.

*Starling* for defendant.

The Revenue Judge dismissed the plaintiff's suit with costs. In his judgment he said:

With respect to plot No. 1, Mr. Carnac, for the plaintiff, argued that it was held by the plaintiff's father outright; that his application, which was accepted, was for sanction to hold the land on a payment of ground-rent and was so granted to him and which rent is not an assessment, and that the fact of the Collector's bills, although exhibiting the notice that their issue was under the Bombay Revenue Act, calling for the payment, and the payment thereof by the plaintiff or his predecessor in title of the Collector's assessment, cannot alter the tenure of the land: that plot 2 is held under section 26 of the Bombay Revenue Act enforcing the plaintiff's father to pay for it a highly penalized value and which cannot be considered an assessment, and therefore cannot be enhanced at the will of Government, and he asks that the Court should hold that the plot 3 is held under the same tenure as plot 1. He relies on the correspondence arising during the negotiations connected with the acquirements by the plaintiff's father of the land between the Collector and himself, which notwithstanding that the Collector did subsequently in his bills treat the same as assessed land, shows that he then treated it as a matter only of the payment of rent and not of assessment. I am not asked for a finding with respect to issue 1. I find issues 2, 3 and 4 in the negative. With respect to issues 5 and 6, I am of opinion that the plaintiff is now precluded, if he ever possessed the right to hold that portion of land here described as plot No. 1 at fixed ground-rent of 30 pies per burga of sixty square yards, from claiming any right he may have concluded he possessed after his acceptance of the assessment made by the Collector as evidenced by the payment thereof from the time when the assessment was first levied to the notice of August of last year, and that nothing has been shown in the hearing of this suit which empowers me to affirm the statement in argument that the tenure of the holding of the land by the plaintiff has ever been accepted or acknowledged by Government to be for any fixed period of time; or that he should hold any portion of it at any specific assessment or for a sum not exceeding the limit of the assessment of the ground-rent he has hitherto paid.

I decide issue 7 in the affirmative and issue 8 in the negative and for the reasons given I dismiss the plaint with costs.

The plaintiff appealed.

*Rivett-Carnac* for the appellant.

*Scott* (Acting Advocate General) and *Kirkpatrick* for the respondent.

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The arguments were similar to those in the case of *Dadoba Janardhun & Co.* v. *The Collector of Bombay* (see *supra*, page 714).

JENKINS, C.J.:—The plaintiff is the owner of a piece of land at Mahalaxmi and he has brought this suit under Bombay Act II of 1876 against the Collector, praying that it may be declared that there is a right on his part, in limitation of the right of Government, to possess and hold the piece of land at the fixed and uniform rent mentioned in the plaint.

The piece of land consists of three plots acquired at different times. The first was bought from the Collector in 1880. On the 3rd of May in that year Ruttonsey Khimjee, the plaintiff's father, wrote to the Collector as follows:

*Bombay, 3rd May 1880.*

To H. E. JACOMB, Esq., Collector of Bombay.

Sir,—I wish to reclaim a piece of sea ground to the westward of my bungalow at Breach Candy, Warden Road, No. 92, as shown by pink colour in the accompanying plan, and request that you will be pleased to grant me the necessary permission on payment of the usual valuation for the ground. I may further state that the reclamation is not likely to interfere with any public or private interest.

I have the honour &c.,

RUTTONSEY KHIMJEE.

On the 13th of August the Collector placed by letter this offer before Government for their sanction. He said:

I have the honour to inform you that Mr. Ruttonsey Khimjee has applied to me for permission to reclaim a piece of Government sea land at Warden Road near his bungalow containing 701 square yards and coloured pink on the accompanying tracing, and to request you will be good enough to obtain the sanction of Government to my selling the land to Mr. Ruttonsey at the rate of rupee one a square yard and ground rent at 30 pies per burga of 60 square yards per annum.

A reference was made by me on the subject to the Public Works Department, the Consulting Engineer for Railways and the Municipal Commissioner, and they have stated that the land is not required by them.

On the 1st September, 1880, a Government Resolution was published according the required sanction. On the 9th September the Collector wrote to Mr. Ruttonsey Khimjee:

No. 1398 of 1880.

*Bombay Collector's Office, 9th September, 1880.*

To RUTTONSEY KHIMJEE, Esq.

Sir,—With reference to your letter dated the 3rd May, 1880, I have the honour to inform you that Government have in their Resolution No. 4593, dated 1st

instant, Revenue Department, sanctioned the sale of land at Warden Road applied for by you at the rate of one rupee a square yard and ground rent at 30 pies per burga of 60 square yards per annum. I therefore request you will be good enough to send me the sum of Rs. 701 on account of 701 square yards of land in question. On receipt of the money a surveyor will be sent from this office to make over the land to you. I have the honour, &c.

H. E. JACOMB, Collector.

The purchase price was paid and possession was delivered.

The acquisition of the second plot was the result of an encroachment. It seems that Mr. Ruttonsey having erected steps and a gallery projecting from his house over Government sea land at Mahalaxmi, failed to remove the encroachment as required. Thereupon the Collector, purporting to act under the second paragraph of section 26 of the Bombay City Land Revenue Act, 1876, charged Mr. Ruttonsey with five times the value of the land and fixed an assessment of five times the ordinary annual land revenue on the land, and caused it to be entered in his records in the name of Mr. Ruttonsey Khimjee.

The third plot was bought from the Collector. On the 14th February, and again on the 26th March, 1885, Mr. Ruttonsey applied by letter for a grant of a piece of land about 100 feet by 5 feet at Mahalaxmi. A report was submitted to the Collector, evidently under his direction, in which it was said:—"It is a portion of the sea land. Rate of valuation is Re. 1 per square yard and rent at 30 pies per burga of 60 square yards." Rs. 208-14-3 was paid by Mr. Ruttonsey as the purchase price and possession was delivered to him.

It was thus that Mr. Ruttonsey became entitled to the piece of land to which this suit relates. Assessment was paid at the rates originally agreed until 1899, and then the following notice was sent by the Collector:

*Bombay Collector's Office, 18th August, 1899.*

To Mr. RUTTONSEY KHIMJEE.

Sir,—I hereby on behalf of Government give you notice that under section 8 of Bombay Act II of 1876, I have fixed the assessment for land revenue on the marginally noted land in your possession at Rs. 0-3-0 (three annas) per square yard per annum. The assessment will come into force on 1st October, 1899, and is guaranteed for thirty years from that date.

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Thereupon this suit was commenced. It was heard by the Revenue Judge, who dismissed it with costs, and from his decision the present appeal has been preferred.

The appellant has urged before us as in the companion appeal *Dadoba Janardhan* v. *Collector of Bombay*(1): (1) that the action of the Collector in enhancing the assessment was invalid as he did not obtain the previous sanction of Government; (2) that there was no such settlement as is required by section 9 of the Act; (3) that the plaintiff is not a superior holder, and therefore does not come within the operation of the Act; (4) that the assessment is unreasonable, and therefore open to revision by this Court; and (5) that a specific limit to enhancement has been established and preserved.

The question on the merits is whether the Collector is entitled to enhance the revenue to the extent, it is said, of seventy-two times its amount without giving the plaintiff any opportunity of being heard; for that, we have been told, is the somewhat startling result of his notice, if he has the power he claims.

Now the sale of the first plot was expressly stated to be at a ground rent of 30 pies per *burga*, and I fail to see why this should not be the establishment of a specific limit to the assessment. It was conceded in the argument that had there been a lease for a term of years at a ground rent of 30 pies per burga that would have been the establishment of a specific limit during that term, and it can make no difference that the grant is in perpetuity and not for a term of years, whereas here the purchaser has paid the full capital value of the property.

Taking the plots in the order of date, the next is that which was acquired by means of the encroachment. In connection with this plot the parties purported to proceed under section 26 of the Act, though it does not appear from the record that the previous sanction of Government was obtained. However, no point has been made of this in the pleadings or at the hearing, so that I will treat this part of the case as if all formalities had been observed. I think the meaning of the second paragraph of the section is that the Collector can, if the encroacher so desire,

(1) *Supra*, p. 714.

permit him to acquire the property at the price and at the assessment named in the section; that is in effect, that, subject to the limitations imposed by the section, the Collector can sell to him the land on which the encroachment has been made. This is what was done in relation to this particular encroachment, and the Collector having charged the maximum price and imposed the maximum assessment, and that without reserving to himself any right, cannot now enhance as he claims to do.

There is, I think, another objection to the enhancement. By section 26 a limit is imposed on the assessment the Collector can fix; it must not exceed five times the ordinary land revenue on the land, that is the land revenue of similar land in the vicinity. We know from the documents in the case that the assessment on this encroachment was fixed at its maximum, so that we have to see what right the Collector has to enhance this maximum rate. Clearly he could not the next day have enhanced, that would be in contravention of the provisions of section 26 and there is nothing in the case which goes to show any alteration of circumstances that would justify the increased assessment now fixed by the Collector.

The circumstances as to the third plot only differ from those of the first in the fact that the Collector did not, prior to completion, write and inform the purchaser what the ground rent was to be. From the record, however, it may be inferred that Mr. Ruttonsey saw the Collector in reference to this purchase. Unfortunately Mr. Ruttonsey is dead and the defendant has produced no evidence as to what passed at the interview, so that here, too, we have to rely on such inferences as the facts suggest. What we find is that the circumstances of the first and the third plots are alike; they in fact now are part and parcel of the same piece of land. Then again we find that the purchase price and the assessment actually imposed are precisely the same.

From this I think it is the reasonable inference that as in the first, so in the second purchase, the limit of the assessment was fixed. The learned Revenue Judge regarded the form in which the receipts were given and taken as a circumstance adverse to the plaintiff; it is a matter to be taken into account, but it seems to me to be outweighed by the other facts of the case.

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The result is that in my opinion a specific limit has been imposed on the assessment of each of the three plots, so that the decree of the Revenue Judge should be reversed; and a declaration made in the terms of the first part of paragraph (*a*) of the prayer to the plaint; and the enhanced assessment should be set aside. The plaintiff should get his costs throughout.

By agreement of the parties Appeal No. 12 of 1901 follows the result of Appeal No. 13 and in it the like decree will be passed.

CHANDAVARKAR, J.:—I concur. The case does not present any difficulty so far as plots 1 and 3 are concerned, and it is clear to my mind that those plots were sold to the plaintiff by Government for their full price subject to the payment of a fixed ground rent without any intention to reserve the right of enhancing it. The only doubt I had was as to plot No. 2, because that did not form the subject of a contract proper between Government and the plaintiff's father, but was encroached upon by the latter. The Collector under section 26 of Bombay Act II of 1876 levied the full penalty and the ground rent. The question is whether that action of the Collector taken under the section amounts to a sale of the land to the plaintiff's father. He came in at first as a wrong-doer and a wrong-doer is liable to have every presumption made against him. But the Collector's action taken under section 26 seems to me to have the same effect as a sale of the plot for its full price. The Collector could have either removed the encroachment and resumed the land or proceeded under that section. When adopting the latter alternative, he proposed that the plaintiff's father should retain possession of the plot upon payment of five times the value of the land and five times the ordinary land revenue and a fixed amount as annual ground rent, and the plaintiff's father was allowed to remain in possession under it, there was a proposal and there was an acceptance amounting to a contract by which the Government and the plaintiff are bound. The Revenue Judge in the Court below has decided this case against the plaintiff on the sole ground that by paying for a number of years to Government the rent under receipts purporting to be passed for land assessable under section 8 of Bombay Act II of 1876 the plaintiff has estopped himself from raising the contention that the land cannot be

re-assessed to the land revenue at the discretion of the Collector. But I fail to see where the estoppel comes. The receipts were in a printed form prescribed by the Collector and mere payments made under them cannot estop the plaintiff because, in the first place, such payment cannot amount to a representation by the plaintiff's father that he held on a tenure liable to the enhancement of assessment at the Collector's discretion, in the second place if it did amount to that, there is no evidence that the Collector acting on behalf of Government was misled by such representation or in any way acted upon it so as to alter their position to their prejudice. I agree, therefore, to the decree proposed.

*Decree reversed.*

Attorneys for plaintiff-appellant—*Messrs. Sorabji and Jehangir.*

Attorney for defendant-respondent—*Mr. E. F. Nicholson, Government Solicitor.*

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ADOPTION—*Adoption by a mother succeeding to her son who has been married—Ceremonial competency of the son no bar to the adoption—Only limitation to a mother's right to adopt—Hindu law.*] A mother succeeding as heir to her deceased son who has left neither widow nor issue, is competent to adopt, notwithstanding the fact that her deceased son had attained ceremonial competency by marriage, investiture or otherwise before his death.

The real limitation on a mother's right to adopt when she succeeds as heir to her son does not depend upon the investiture, marriage or ceremonial competency of her deceased son, but upon the question whether by such adoption she derogates from any other rights save her own.

Jivaji Krishna, the holder of a kulkarni vatan, mortgaged the vatan lands to the defendants in 1879. He died in 1884 at the age of 30 without issue. His wife had predeceased him, and his mother Tulsava therefore succeeded as heir. In 1894 she adopted the plaintiff and died shortly afterwards. In 1896 the plaintiff

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brought this suit to set aside the mortgage and recover the mortgaged lands. The defendants contended (*inter alia*) that Tulsava's right to adopt has been extinguished because her deceased son had been married and had attained ceremonial competency, and that the plaintiff's adoption was therefore invalid, and his suit could not be maintained.

*Held*, that the plaintiff's adoption by Tulsava was valid, inasmuch as it only affected her own interests and did not affect the vested rights of others.

VENKAPPA *v.* JIVAJI KRISHNA ... ... ... (1900) 25 Bom. 306

ADOPTION—*Dwyamushyayana adoption—Power of a Hindu widow to give away an only son in adoption—Hindu law.*] A Hindu widow can make a valid gift of her only son in adoption.

The power of giving and taking an only son in adoption in the *Dwyamushyayana* form is not confined to brothers, but may also be exercised by their widows.

*Lakshmappa* v. *Ramava* ((1875) 12 B. H. C. R., 364) explained and distinguished.

KRISHNA *v.* PARAMSHRI... ... ... ...(1901) 25 Bom. 537

———*Gift of a son in adoption by a Hindu convert to Mahomedanism—Validity of such adoption—Hindu law.*] A Hindu father does not lose his capacity to give his son in adoption by reason of his conversion to Mahomedanism.

*Quære*, whether this holds good in the case of Brahmans, among whom the *Datta-homa* ceremony is necessary.

Plaintiff, a Rajput, whose natural mother was dead and whose natural father had become a convert to Mahomedanism, was given in adoption by his uncle to whom the natural father had given the necessary authority.

*Held*, that the adoption was valid.

SHAMSING *v.* SANTABAI... ... ... ... (1901) 25 Bom. 551

———*Reversioner—Limitation Act (XV of 1877), Arts. 118 and 141—Suit by a reversioner for possession of immoveable property.*] A suit by a Hindu reversioner to recover possession of immoveable property after the death of a childless widow is barred by article 118 of the Limitation Act (XV of 1877) if the claim to such possession cannot be established without setting aside the defendant's adoption of which the plaintiff had become aware more than six years before suit.

Raiji Khoda, a Hindu, died in 1869, leaving behind him a childless widow. In 1884 plaintiffs applied for a certificate of heirship to the deceased's estate under Regulation VIII of 1827. The widow opposed the application alleging that the deceased had adopted a son (defendant No. 1) in 1863-64. The certificate was refused, and both parties were referred to a suit for the purpose of determining the question of the alleged adoption. But neither party filed a suit.

In 1897 the widow died and thereupon plaintiffs as reversionary heirs sued to recover possession of the deceased Raiji's property.

The defendant pleaded that he was the adopted son of Raiji, and that the suit was barred by limitation.

Both the lower Courts held that the adoption was not proved, and that the suit was not time-barred.

*Held*, on second appeal, that though the defendant's adoption was not proved, yet as he had all along asserted his adoption to the knowledge of the plaintiffs since 1884, plaintiffs' suit was barred by article 118 of the Limitation Act (XV of 1877).

BAROT NARAN *v.* BAROT JESANG ... ... ...(1900) 25 Bom. 26

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ADVERSE POSSESSION—*Joint family—Adverse possession of a co-sharer as against another co-sharer—Burden of proof—Limitation.*] The land in question in this suit had formerly been the joint property of three brothers—Kalian, Dullabh and Vallabh. In 1884 Kalian and Vallabh removed to a village elsewhere, and Dullabh was left in exclusive possession of the land which he cultivated until his death in 1894, when his daughter, the first defendant, entered into possession. In 1888, however, Kalian and Vallabh had sold the land to one Nagar, who in 1895 sold it to the plaintiff. In 1897 the plaintiff brought this suit for possession. The first Court passed a decree in his favour, but on appeal the Judge reversed the decree, holding that the defendant and her father Dullabh had had adverse possession for more than twelve years and that the suit was therefore barred.

On second appeal,

*Held*, by the High Court, that adverse possession had not been proved. The burden of proving adverse possession should have been placed on the defendant. Possession to be adverse must be shown to be continuous, public and adequate to the circumstances of the case.

As between brothers, especially when no partition is proved, the adverse possession of one should be proved by more satisfactory evidence than was given in this case.

JAGJIVANDAS *v.* BAI AMBA ... ... ...(1900) 25 Bom. 362

APPEAL—*Exclusion of time for obtaining copies of judgment and decree appealed against—Limitation Act* (*XV of* 1877), *secs.* 5 *and* 12.] An application for a copy of the decree may be made by an intending appellant at any time within the prescribed period of limitation, and he is then entitled under section 12 (in computing the period of limitation) to exclude the time requisite for obtaining such copy.

By section 5, in case the period of limitation prescribed for an appeal expires on a day when the Court is closed, the appeal may be presented on the day the Court re-opens. An application for a copy of the decree may be made on that day, and if so made, the time for obtaining such copy is excluded under section 12.

So long as the right to present an appeal subsists, the exclusion sanctioned by section 12 of the Limitation Act (XV of 1877) applies.

*Siyadat-un-Nissa* v. *Muhammad Mahomed* ((1897) 19 All. 342) followed.

PANDHARINATH *v.* SHANKAR ... ... ... (1901) 25 Bom. 586

———*Joint appellants—Presentation of appeal beyond time—Affidavit excusing delay in appealing made by only one of appellants stating reasons personal to himself—Appeal admitted—Variation of decree on a point affecting other appellants but not the appellant who made the affidavit—Variation not allowed—Civil Procedure Code* (*XIV of* 1882), *section* 544—*Limitation Act* (*XV of* 1877), *section* 5—*Practice.*] In a partition suit a decree was passed against twenty-four defendants whose interests in the subject-matter of the suit were not identical. Part of the property in suit consisted of a kulkarni vatan, one-third share of which (*inter alia*) was given by the decree to the plaintiffs. Eleven of the defendants appealed against the decree, of whom only six (defendants 1 to 6) had an interest in the kulkarni vatan. The decree was passed on the 11th April, 1898, and the appeal was not presented until the 7th June, 1898, *i.e.* beyond the period (thirty days) allowed by the Limitation Act (XV of 1877). The only affidavit excusing the delay was made by defendant 14, who was not interested in the kulkarni vatan, and it stated reasons for the delay which were personal to himself, and did not apply to the other appellants. On this affidavit, however, the appeal was admitted, and the lower appellate Court modified the decree and reduced the one-third share of the kulkarni vatan given to the plaintiffs to a one-sixth share. The plaintiffs thereupon appealed to the High Court.

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*Held* (reversing the decree of the lower appellate Court and restoring that of the first Court) that the appellate Court erred in altering the share of the kulkarni vatan. Defendant 14 had no interest in the variation of the decree, having no interest in the kulkarni vatan, and section 544 of the Civil Procedure Code (XIV of 1882) did not apply. The variation was only in favour of defendants 1 to 6, who alone were interested in the vatans. They, however, had not excused their delay in presenting the appeal and it was barred by Limitation.

VISHWANATH RAMKRISHNA *v.* VASUDEV ... ... (1901) 25 Bom. 699

APPEAL—*Jurisdiction—Small Causes suit—Subordinate Judge invested with Small Cause jurisdiction—Small Cause suit tried by a Subordinate Judge under his ordinary jurisdiction.*

*See* SMALL CAUSE COURT ... ... ... ... 417

———*Order refusing to set aside a sale—Appeal from such order—execution—Decree— Sale in execution—Civil Procedure Code (XIV of 1882), secs. 310A and 244 (c).*

*See* CIVIL PROCEDURE CODE, SEC. 310A ... ... ... 418

———*Subsisting right of appeal—Application for copies—Exclusion of time in computing the period of limitation— Limitation Act (XV of 1877), secs. 5 and 12.*] So long as the right of appeal is subsisting, an appellant is entitled under section 12 of the Limitation Act (XV of 1877) to apply for a copy of the lower Court's decree. The time requisite for obtaining such copy should be excluded in computing the period of limitation prescribed for the appeal.

*Siyadat-un-Nissa* v. *Muhammad* (1897) 19 All. 342) and *Sitaram* v. *Ramji* (1900) P. J. p. 53) followed.

TUKARAM *v.* PANDURANG ... ... ... (1901) 25 Bom. 584

———*Trial by jury—appeal on a matter of fact—Practice—Procedure—Criminal Procedure Code (Act V of 1898), secs. 269 and 418—Offence triable with the aid of assessors tried in fact by a jury.*

*See* CRIMINAL PROCEDURE CODE ... ... ... ... 680

ASSESSMENT—*Enhancement of assessment— Bombay Act II of 1876—Purchase of land from Government—Encroachment—Acquisition of land under sec. 26 of Bombay Act II of 1876—Vendor and Purchaser—Estopped—Land Revenue in Bombay.*

*See* LAND REVENUE ... ... ... ... ... 752

———*Enhancement of assessment—Bombay Act II of 1876—Sale of land by Government to a purchaser assessed at a certain rate—Subsequent enhancement—Vendor and Purchaser—Estoppel—Evidence Act (I of 1872), sec. 115—Land Revenue in Bombay.*

*See* LAND REVENUE ... ... ... ... ... 714

———*Land Revenue—Suit for arrears of assessment—Limitation Act (XV of 1877), articles 110 and 120.*] The term "rent" is used in the Code only with reference to those superior and inferior holders between whom the relationship of landlord and tenant subsists.

Plaintiff was the *Inámdár* of a certain village. Defendant held certain lands in the said village, but he was not placed in possession thereof either by the plaintiff or his predecessor in title under any agreement. Plaintiff sued to recover from the defendant five years' arrears of assessment. Defendant contended that the plaintiff was not entitled to claim arrears for more than three years.

*Held*, that the suit was governed by article 120 and not 110 of the Limitation Act (XV of 1877), the relationship between the parties being that of superior and inferior holder and not that of landlord and tenant.

SADASHIV *v.* RAMKRISHNA ... ... ... (1901) 25 Bom. 556

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ASSESSORS—*Criminal Procedure Code* (*V of* 1898) *secs.* 284, 285 *and* 537—*Trial with aid of assessors—Trial with the aid of one assessor only—Legality of such trial.*

*See* CRIMINAL PROCEDURE CODE ... ... ... ... 694

AWARD—*Ground for setting aside an award—Specific Relief Act* (*I of* 1877), *Ch. V, Sec.* 39,—*Exercise of Court's discretion—Conduct of plaintiffs—Reasonable apprehension of injury—Coercion.*] The plaintiffs and defendants together with one Jaffar Gangji, who died before the date of this suit, entered into a partnership in February 1895, to do certain work for the Mahárája Holkar at Indore. The work was done and paid for, whereupon disputes arose among the partners as to the allocation of the payments. Criminal proceedings were instituted at Indore by the first and the third defendants and the fourth plaintiff, Cooverji, against the first and second plaintiffs, who were arrested under warrants on the 20th June 1895. They were subsequently released on bail, and while the proceedings against them were still pending, matters in dispute between the plaintiffs and the defendants were referred to arbitration on the 9th September 1895, and an award made on the 17th September 1895. The submission paper and the award were signed by all the parties except the fourth plaintiff, Cooverji. The criminal proceedings at Indore were then withdrawn.

On the 21st June 1898, the first and second defendants filed a suit against the first three plaintiffs in the Court at Indore to recover from them the amount due under the award, but on the 7th July following the plaintiffs (four in number) filed this suit to have the award declared null and void and for an injunction against the defendants Nos. 1 and 2 restraining them from proceeding with their suit at Indore.

The lower Court held that the allegations of collusion and fraud made by the plaintiffs were false, but held that the award was not binding on any of the parties, inasmuch as the fourth plaintiff (Cooverji) had not signed the submission paper.

In appeal the Court agreed with the lower Court as to the allegations of collusion and fraud, but, without expressing any opinion on the question whether the award was rendered invalid by reason of the fact that the fourth plaintiff (Cooverji) had not signed the submission paper, their Lordships reversed the decree and dismissed the suit on the ground that no case had been made out by the plaintiffs for the special intervention of the Court under Chapter V of the Specific Relief Act (I of 1877). The plaintiffs had not shown that they had reasonable apprehension that the award if left outstanding would cause them serious injury, nor had their conduct been such as to call for an exercise of the Court's discretion under section 39 of the Act in their favour.

Per JENKINS, C. J.—In a suit of this nature, three points must be made good by the plaintiffs: (1) that the award is void or voidable; (2) that the plaintiffs have a reasonable apprehension that such instrument if left outstanding may cause them serious injury; (3) that the Court ought, under the circumstances of the case, in the exercise of its discretion to adjudge the award void or voidable and order it to be delivered up and cancelled.

*Antram* v. *Chace* ((1812) 15 East, 209) discussed and distinguished.

VULLEY MAHOMED *v.* DATTUBHOY... ... ... (1900) 25 Bom. 10

BANK—*Banker and Customer—Pass-book—Cheque lodged by customer for collection—Effect of entry in customer's pass-book of such cheque as if collected—Estoppel.*] Early in March 1900, the Hope Mills Company purchased 600 bales of cotton from the plaintiff at Rs. 278 per *candy*, but, being unable to accept and pay for them, it was arranged between the Company and the plaintiffs that one Shridhan should take them over from the plaintiffs at Rs. 243-8-0 per *candy* (the price having fallen in the meantime) and that the Company should pay the plaintiffs the difference of price. In fulfilment of this agreement the Company sent to

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the plaintiffs a cheque for Rs. 9,500 drawn by them on the Commercial Bank, being approximately the amount of the difference. This cheque was given to the plaintiffs on the 23rd March 1900, but was post-dated the 3rd April. It was sent by the plaintiffs for collection to the defendant Bank (with which the plaintiffs had an account) on the next day (the 4th) at about 12 o'clock together with the plaintiffs' pass-book. The pass-book was asked for by the plaintiffs and was returned to them at about 4-30 o'clock on the same day with the Rs. 9,500 duly credited therein and initialled by one of the Bank's officers. On that same afternoon the plaintiffs delivered 100 of the bales to Shridhan. On the next day (the 5th April) another 100 bales were delivered by the plaintiffs to Shridhan, and after the delivery had proceeded thus far the plaintiffs at about 1-30 o'clock on the 5th April received notice from the defendant Bank that the Company's cheque for Rs. 9,500 had been dishonoured. Subsequently to the receipt of this notice the plaintiffs delivered the remaining 400 bales to Shridhan. The plaintiffs now sued the defendant Bank to recover the sum of Rs. 9,500, alleging that it was impossible to recover the amount from the drawers of the cheque (the Company), and contending that the defendant Bank by entering the said amount in the plaintiffs' pass-book and delivering the said book to them had led them to believe that the cheque had been duly honoured and the amount paid into their account, and they alleged that they would not have delivered the said bales to Shridhan if it had not been for the said representation by the Bank. They contended that the Bank was estopped from alleging the dishonour and non-payment of the cheque.

*Held*, that the returning of the pass-book to the plaintiffs by the Bank and the noting and initialling of the entry of Rs. 9,500 therein was a representation by the Bank that it had received payment of the cheque and was prepared to give the plaintiffs' credit for the amount. But

*Held*, upon the evidence that the delivery of the bales by the plaintiffs to Shridhan was not made on the faith of such representation by the Bank.

*Held*, further, that the plaintiffs were not entitled to recover and that the Bank was not estopped by the entry in the pass-book from alleging the non-payment of the cheque. The cheque having been lodged by the plaintiffs for collection on the 4th April, the Bank in the ordinary course of business had until the next day to give notice of its dishonour and the entry in the pass-book made on the 4th was not intended to be an acknowledgment of cash received. The Bank never intended the plaintiffs to act upon the entry in the pass-book made on the 4th upon the faith of its being an entry of cash actually received, and further, the cheque was a post-dated cheque, and the plaintiffs when lodging it clearly had doubts as to whether it would be honoured or not, while the defendant Bank had no knowledge of any circumstance justifying doubts as to its payment. The parties thus did not deal on equal terms and the defendant Bank was therefore not bound by the entry in the pass-book as a receipt—(*Martin* v. *Morgan*, (1819) 1 Bro. and B. 289).

MOWJI *v.* NATIONAL BANK OF INDIA ... ... (1900) 25 Bom. 499

BANK OF BOMBAY—*Presidency Banks Act* (*XI of* 1876), *Secs.* 36 *and* 37—*Powers of Directors to lend money on equitable mortgage.*] The directors of the Bank of Bombay discounted at different times promissory notes for sums amounting in all to about Rs. 60,000 drawn by the firm of Fazulbhoy Meheralli Chinoy in favour of one Meheralli Mahomed Chinoy, who, it subsequently appeared, was a partner in the firm, but was not known to be so at the time of the said transactions. Before discounting the latter notes the Directors of the Bank obtained from Meherally an equitable mortgage by deposit of title-deeds on certain immoveable properties situate in Bombay and Mahabaleshvar as security for the then existing and future indebtedness of the said firm or Meheralli to the Bank. The notes became due and were dishonoured, the firm having in the meanwhile become insolvent. The bank thereupon sued the Official Assignee, as assignee of the firm's estate, to recover the sums due on the notes and for a declaration

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that it was entitled to a charge on the immoveable properties held by it as security. The Official Assignee contended that under section 37 of the Presidency Banks Act (XI of 1876) it was illegal for the Bank to lend money on equitable mortgage and that no valid charge had been created.

*Held* that, notwithstanding the provisions of the said Act, the Bank was entitled to realize the securities.

*Held*, also, that the provisions of section 37 of the Act did not invalidate a charge on immoveable property created as a security for a *bonâ-fide* liability already in existence.

The words of section 37 impose a restriction on making a loan on mortgage of immoveable property, not upon the Bank but upon the Directors. As between the Directors and the Bank the Directors would be liable for any loss resulting from the breach of the provisions of the sections, but the mortgagors could not repudiate the obligation into which they purported to enter, and the Official Assignee was not in a more favourable position.

TURNER *v.* BANK OF BOMBAY ... ... ... (1900) 25 Bom. 52

BILL OF EXCHANGE—*Meaning of the word "honoured" in reference to a bill of exchange—Right of acceptor of bill to shipping documents—Letter of credit.*
*See* LETTER OF CREDIT ... ... ... ... ... 706

BOUNDARY DISPUTE—*Jurisdiction—Land Revenue Code (Bombay Act V of 1879), Secs.* 119, 120 *and* 121—*Settlement of such dispute by Collector—Civil Court's jurisdiction.*
*See* LAND REVENUE CODE ... ... ... ... 312

BURDEN OF PROOF—*Evidence—Effects of plaintiffs' possession—Presumption of title—Evidence Act (I of* 1872), *Sec.* 110—*Possession—Declaration of title—Suit by person in possession for declaration of title.*
*See* POSSESSION ... ... ... ... ... 287

———————*Limitation—Adverse possession—Joint family—Adverse possession of a co-sharer as against another co-sharer.*
*See* ADVERSE POSSESSION ... ... ... ... 362

CASES—*Agra and Masterman's Bank, Ex parte* (1867) L. R., 2 Ch., 396, referred to.
*See* LETTER OF CREDIT ... ... ... ... ... 706

*Antram* v. *Chace* (1812) 15 East, 209, discussed and distinguished.
*See* AWARD ... ... ... ... ... ... 10

*Baswantapa* v. *Ranu* (1884) 9 Bom., 86, distinguished.
*See* CIVIL PROCEDURE CODE ... ... ... ... 337

*Collector of Salem* (1873) 7 Mad. H. C. R., 379.
*See* CRIMINAL PROCEDURE CODE ... ... ... ... 702

*Empress* v. *Joggessur* (1878) 3 Cal., 379.
*See* CRIMINAL PROCEDURE CODE ... ... ... ... 702

*Imperatrix* v. *Balya Dagdu* (1898) Cr. Rul. No. 3, dissented from.
*See* EVIDENCE ... ... ... ... ... 168

*Janki Kunwar* v. *Ajit Singh* (1887) 15 Cal., 58, distinguished.
*See* LIMITATION ACT ... ... ... ... ... 78

*Lakshmappa* v. *Ramava* (1875) 12 B. H. C. R., 364, explained and distinguished.
*See* ADOPTION ... ... ... ... ... 537

*Martin* v. *Morgan* (1819) 1 Bro. and B., 289.
*See* BANK ... ... ... ... ... ... 499

*Nagarji, In re* (1894) 19 Bom., 340, distinguished.
*See* CRIMINAL PROCEDURE CODE ... ... ... ... 90

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*Parsha* v. *Lagmya* (1888) 13 Bom., 83, followed.
*See* VATAN ... ... ... ... ... ... 186

*Queen-Empress* v. *Bhau* (1898) 23 Bom., 493, doubted.
*See* CRIMINAL PROCEDURE CODE ... ... ... ... 675

*Queen-Empress* v. *Karigowda* (1894) 19 Bom., 51, distinguished.
*See* CRIMINAL PROCEDURE CODE ... ... ... ... 90

*Queen-Empress* v. *Lakhpat* (1893) 15 All., 365, followed.
*See* CRIMINAL PROCEDURE CODE ... ... ... ... 48

*Reg.* v. *Balvant* (1874) 11 B. H. C. R., 137, followed.
*See* EVIDENCE ... ... ... ... ... 168

*Reg.* v. *Kusa* (1870) 7 B. H. C. R., 70, followed.
*See* CRIMINAL PROCEDURE CODE ... ... ... ... 712

*Reg.* v. *Surya* (1866) 3 B. H. C. R., 38, followed.
*See* CRIMINAL PROCEDURE CODE ... ... ... ... 712

*Sakharam* v. *Hari* (1881) 6 Bom., 113.
*See* PARTNERSHIP ... ... ... ... ... 606

*Sitaram* v. *Ramji* (1900) P. J., p. 53, followed.
*See* LIMITATION ACT ... ... ... ... ... 584

*Siyadat-un-Nissa* v. *Muhammad* (1897) 19 All., 342, followed.
*See* LIMITATION ACT ... ... ... ... ... 584

*Siyadat-un-Nissa* v. *Muhammad* (1897) 19 All., 342, followed.
*See* LIMITATION ACT ... ... ... ... ... 586

*Yamunabai* v. *Manubai* (1899) 23 Bom., 608, referred to and distinguished.
*See* HINDU LAW ... ... ... ... ... 263

CAUSES OF ACTION—*False evidence not actionable—Conspiracy to give false evidence—Costs—Costs in the cause, meaning of such order made in an interlocutory proceeding.*] No civil action lies against a witness for giving false evidence, and the fact that the evidence is given in pursuance of a conspiracy to obtain the conviction of the accused person does not make any difference. The only remedy against a false witness is a prosecution for perjury.

Where, therefore, a plaintiff sued three defendants for giving false evidence against him in a trial at Bombay, alleging that it was done in pursuance of a conspiracy entered into at Hyderabad to obtain his conviction,

*Held*, that the plaint disclosed no cause of action.

A mere conspiracy to injure a man without an overt act resulting in the injury does not furnish any cause of action. A conspiracy is not illegal unless it results in an act done which by itself would give a cause of action.

Where in an interlocutory proceeding the order as to costs is that the costs thereof shall be "costs in the cause," these words do not mean that costs will follow the event, but that those costs remain to be dealt with by the Court at the hearing, the Judge at the trial having still power to deal with such costs.
TEMPLETON *v.* LAURIE ... ... ... (1900) 25 Bom. 230

———*Survival of, against defendant's heirs—Practice—Procedure—Minor—Suit to recover custody of—Suit by father for the recovery of his children illegally detained—Tort—Death of defendant pending suit.*
*See* PRACTICE... ... ... ... ... ... 574

CIVIL PROCEDURE CODE (ACT X OF 1877), SECS. 234, 248, 311—*Execution—Decree—Death of judgment-debtor after decree but before execution—Sale in execution without notice to legal representatives—Notice given to wrong person—Title of purchaser at such sale—Sale irregular but not a nullity—Suit to set aside such sale must be brought within one year—Limitation Act (XV of 1877),*

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*Art.* 12.] An account and redemption of a mortgage effected in 1877 were refused where the mortgaged property had since then been sold at a judicial sale in execution of a decree. The plaintiffs were the heirs representing the mortgagor. The purchaser at the sale was the mortgagee. The sale took place after notice had been wrongly served upon a person who was not the legal representative of the judgment-debtor's estate. The executing Court had erroneously decided that he was to be treated as such representative.

*Held*, that the judicial sale was not a nullity, and could not be treated as invalid, notwithstanding this irregularity, even though a material one, for the jurisdiction of the Court to execute had been complete throughout. It had not been lost by reason of the above error, and had empowered the Court to decide wrongly as well as rightly.

On an irregularity such as this the aggrieved party had his remedy by taking within due time the course prescribed in section 311 of the Civil Procedure Code (X of 1877), or suing for getting the order set aside. That course had not been followed within the period fixed by article 12, schedule II, of the Limitation Act XV of 1877, one year from the confirmation of the sale, which was valid, and formed a defence to this suit.

*Baswantapa* v. *Ranu* (1884) 9 Bom., 86, distinguished. There the Court actually had not the jurisdiction which it purported to exercise. Here the Court having jurisdiction had by its decree established the debtor's liability and was in the process of working it out, against his estate, when the irregularity took place.

MALKARJUN *v.* NARHARI ... ... ... (1900) 25 Bom. 337

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 13, EXPL. II—*Different suits for the same land alleging different titles—Res judicata.*] The plaintiffs sued to recover certain land, alleging that on the death of the widow of the former owner they became entitled as reversioners. They had previously sued the defendant for the same land claiming as the surviving members of the joint family to which the former owner belonged. That suit had been dismissed.

*Held*, that the present suit was barred by the provisions of section 13 of the Civil Procedure Code (Act XIV of 1882).

GUDDAPPA *v.* TIRKAPPA ... ... ... (1900) 25. Bom. 189

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SEC. 13, EXPL. II—*Relief not claimed in former suit—Res-judicata.*] A sued B as his agent and trustee in possession of certain lands, complaining that B had been dealing with the lands as if he (B) were the owner, and had mortgaged them to C. C was made a defendant in the suit. B pleaded that he was the owner of the land and not merely agent of A. C also pleaded that B was owner, and he produced the mortgage-deed and stated that if he were paid his debt he would not dispute A's claim. The term in C's mortgage-deed was one year, at the end of which if the debt were not paid C was to be at liberty to enforce his charge. A prayed merely for possession, and no issue was raised or relief asked in respect of C's mortgage. The Court held that B was agent, not owner, and gave A a decree for possession. Subsequently on the expiration of the year allowed in the mortgage-deed, C sued A and B to enforce his mortgage, alleging that even though B might not be owner, A had allowed B to deal with the land and to hold himself out as owner and that thus the mortgage was valid. Both the lower Courts held that the suit was *res-judicata* under explanation II of section 13 of the Civil Procedure Code, on the ground that C's present claim might and ought to have been made a ground of defence in the former suit brought by A.

*Held*, reversing the decisions of the lower Courts, that the suit was not barred, as no relief was asked or granted as against C in the former suit, though he was a party to it.

RAMDAS *v.* VAZIRSAHEB ... ... ... (1901) 25 Bom. 589

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CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 13, EXPLS. II AND III—*Res-judicata—Redemption suit—Decree in such suit making no order as to mesne profits—Subsequent suit by plaintiff for surplus mesne profits accrued due prior to former suit.*] In a redemption suit brought in 1894 the plaintiff prayed for possession of the mortgaged property and for payment of such sum as should be found due to him on account of surplus profits received by the defendant. The Court held that the whole mortgage-debt had been paid off in 1883, and awarded possession to the plaintiff, but made no order as to surplus profits. The defendant appealed. The plaintiff did not appeal, nor did he file objections to the decree, which was confirmed by the Appellate Court. In 1897 the plaintiff having obtained possession of the land filed this suit in which (*inter alia*) he claimed to recover mesne profits which had accrued due prior to the former suit.

*Held*, that the claim was *res judicata* and was barred.

KACHU *v.* LAKSHMANSING ... ... ... (1900) 25 Bom. 115

———SEC. 17, EXPL. III—*Jurisdiction—Defendants non-resident foreigners—Cause of action arising within jurisdiction—Letters Patent, clause* 12—*Small Cause Courts Act* (*IX of* 1887), *Sec.* 18.] Under the Civil Procedure Code (Act XIV of 1882) British Courts are empowered to pass judgment against a non-resident foreigner provided that the cause of action has arisen within the jurisdiction of the Court pronouncing the judgment.

RAMBHAT *v.* SHANKAR ... ... ... (1901) 25 Bom. 528

———SECS. 27, 31, 32 AND 34—*Practice—Trade Mark—Rights of importer of goods bearing manufacturer's or producer's trade-mark—Contract by importer for exclusive supply of goods—Parties—Joinder of parties.*

*See* TRADE MARK ... ... ... ... ... 433

———SEC. 43—*Transfer of Property Act* (*IV of* 1882), *Sec.* 99—*Agreement to pay a debt partly in cash and to secure balance by mortgage, or, in default, to execute mortgage for whole amount—Failure to pay part in cash—Decree for such part—Second suit to enforce giving of mortgage for balance barred.*] On a settlement of account between plaintiff and defendant No. 1 it was found that Rs. 15,505 were due by the first defendant to the plaintiff, and an agreement was made between them that Rs. 4,000 of this debt was to be paid off by the first defendant before the 18th September, 1895, and that a mortgage on certain specified immoveable property was to be given for the balance; but, in the event of the first defendant failing to pay the Rs. 4,000 within the stipulated period, the mortgage was to be for the full amount. The agreement was dated 15th June, 1895, was put into writing, and was duly registered. The first defendant failed to pay the Rs. 4,000 as agreed or to execute the mortgage, and the plaintiff on the 16th September, 1899, brought a suit against him to recover the Rs. 4,000 with interest thereon, and obtained a decree on the 29th September, 1899. On the 30th September the plaintiff commenced the present suit against defendant No. 1 and against defendant No. 2, who as judgment-creditor of defendant No. 1 had attached the property specified in the agreement, praying that either the first defendant should be ordered to pass to the plaintiff a mortgage-bond for the balance due, or that a decree should be passed for the recovery of the said balance by sale of the said property and from the first defendant, and that the property be declared liable for the amount claimed.

*Held*, that the suit was barred under section 43 of the Civil Procedure Code (Act XIV of 1882).

GOVIND *v.* PARASHRAM ... ... ... (1900) 25 Bom. 161

———SEC. 153—*Joint debtors—Suit against several joint debtors—Judgment against one joint debtor who admits claim does not bar suit against others—Contract Act* (*IX of* 1872), *Sec.*

43—*Partners—Practice—Procedure.*] In an action against two alleged partners, which came on as a short cause, one of the defendants admitted the claim and judgment was passed against him for the amount claimed. The second defendant denied his partnership with the first defendant and his liability to the plaintiffs, and on his application the case as against him was transfered to the list of long causes and postponed. He then filed a supplemental written statement in which he pleaded that the cause of action alleged in the plaint was joint; that it had become merged in the judgment recovered against the first defendant and that further proceedings in the suit were therefore barred. A preliminary issue on this point was raised and argued.

*Held*, that the suit should proceed. In an action commenced against several joint debtors judgment recovered against one of them who admits the claim does not bar the further prosecution of the suit against the others.

DICK *v.* DHUNJI ... ... ... ... (1901) 25 Bom. 378

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 257*A*—*Decree—Mortgage—Amount of Decree included in the mortgage—Agreement to give time—Satisfaction.*] The agreement to which the first paragraph of section 257A of the Civil Procedure Code (Act XIV of 1882) relates is one which suspends and does not destroy the rights of execution consequent on a decree.

Where a mortgage-bond was given for an amount which included a sum due under a decree and made the whole amount payable in instalments, it was contended, under section 257A of the Civil Procedure Code (Act XIV of 1882), that the bond was void to the extent of the sum due under the decree, being an agreement to give time for the satisfaction of a judgment-debt, and that in respect of that sum no suit would lie.

*Held*, that the suit was maintainable. The mortgage-bond did not suspend the right to execute the decree, but it put an end to the remedy on the decree, and substituted the mortgage-bond. It was the actual and present satisfaction of the judgment-debt, and therefore was not an agreement to give time for the satisfaction of a judgment-debt, and did not fall within section 257A of the Civil Procedure Code.

TUKARAM *v.* ANANTBHAT ... ... ... (1900) 25 Bom. 252

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SEC. 295—*Rateable distribution under several decrees—Decrees must be against same judgment-debtor—Decree against judgment-debtor—Subsequent decree against his legal representative and his estate.*] Mohoniraj obtained a money decree against one Bhau Babaji, who died shortly afterwards. His son Kashinath, as his legal representative, was then placed on the record and the property of the deceased judgment-debtor Bhau Babaji was then attached and sold in execution. Meantime the applicant, Govind Abaji, obtained a decree against "Bhau Babaji, deceased, by his son Kashinath and against the estate of Bhau Babaji, deceased"; and he then applied under section 295 of the Civil Procedure Code (Act XIV of 1882) to share rateably in the proceeds of the sale held in execution of the other decrees.

*Held*, that the application should be refused. Under section 295 the money decrees in respect of which rateable distribution is given must be against the same judgment-debtor. In this case one decree was against Bhau Babaji and the other against his son Kashinath. The fact that the latter decree was expressed to be made against Bhau Babaji, deceased, by his son Kashinath, made no difference. One decree was against Bhau Babaji himself: the other was against his legal representative.

The fact that the second decree was also "against the deceased's estate" did not make Bhau Babaji a judgment-debtor under that decree in a suit commenced after his death.

The practice hitherto prevailing in the mofussil of making a dead man "by his heir" a party to a suit is erroneous and should be discontinued.

GOVIND *v.* MOHONIRAJ... ... ... ... (1901) 25 Bom. 49

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CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 310A AND 244 (c)—*Execution—Decree—Sale in execution—Order refusing to set aside a sale—Appeal from such order.*] An appeal lies from an order passed under section 310A of the Civil Procedure Code (Act XIV of 1882), refusing to set aside a sale where the dispute relates to the execution, discharge or satisfaction of a decree and thus comes within section 244 (c) of the Code.

MURLIDHAR *v.* ANANDRAO ... ... ... (1900) 25 Bom. 418

——SECS. 310A AND 244—*Property privately sold by judgment-debtor prior to Court-sale—Application by judgment-debtor to set aside a Court sale—Application rejected—Application to High Court under sec.* 622—*Practice.*] In execution of a decree passed against a judgment-debtor, his property was sold by auction. Prior, however, to the execution sale, he effected a private sale to another person, and out of the proceeds he paid off the judgment-creditor, who duly certified that the decree was satisfied. Subsequently the judgment-debtor applied under section 310A to set aside the execution sale. His application was refused by the Judge on the ground that, at the date of the execution sale, he had no interest in the property, having disposed of it by private sale. He held, therefore, that he could not apply under section 310A. Against this order the judgment-debtor applied to the High Court under section 622 of the Civil Procedure Code (Act XIV of 1882). It was contended (1) that the order was one under section 244 of the Civil Procedure Code; that an appeal lay from an order under that section, and that therefore he had no right of application under section 622, and (2) that he having disposed of his property by private sale, section 310A did not apply.

*Held*, that section 244 did not apply, inasmuch as the auction-purchaser certainly could not be taken to be the representative of the decree-holder, and even assuming him to be a representative of the judgment-debtor, that section did not apply to a question between a party to the suit and his representative. Section 244 therefore did not apply to the order complained of, which was consequently not appealable, for an order under section 310A is only appealable so far as it comes under section 244 (c). There being no appeal, the judgment-debtor could therefore apply under section 622 of the Code.

(2) Notwithstanding the private sale, the judgment-debtor could apply under section 310A of the Code to set aside the execution sale.

MAGANLAL *v.* DOSHI MULJI ... ... ... (1901) 25 Bom. 631

——SEC. 310A, AS AMENDED BY ACT V OF 1894—*Sale in execution of mortgage decree—Transfer of Property Act (IV of* 1882), *Sec.* 89.] The provisions of section 310A of the Civil Procedure Code (Act XIV of 1882) as amended by Act V of 1894 are applicable to sales held in execution of mortgage decrees passed under the Transfer of Property Act (IV of 1882).

Sections 304 to 319 of the Code of Civil Procedure apply to all sales of immoveable property.

KRISHNÁJI *v.* MAHÁDEV ... ... ... (1900) 25 Bom. 104

——SEC. 331—"*Possession*"—*Constructive possession—Obstruction to possession in execution of decree—Construction.*] The word "possession" as used in section 331 of the Civil Procedure Code (Act XIV of 1882) is not limited to actual physical possession. It includes also constructive possession, such as possession by a tenant. So held by Candy and Tyabji, JJ., Whitworth, J., dissenting.

Where premises sought to be recovered in execution are in the occupation of tenants and the landlord of such tenants obstructs the officer executing the decree,

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the claim of such landlord may be investigated under section 331 of the Civil Procedure Code.

MANCHÁRÁM *v.* FAKIRCHAND ... ... ... (1900) 25 Bom. 478

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 539, 617 AND 647—*Practice—Procedure—Reference to High Court.*] M, claiming to be a trustee or manager of a mosque, applied to the District Judge for permission to grant a lease of lands belonging to the mosque. In response to a proclamation issued, A, the opponent appeared before the District Judge claiming to be the owner of the village in which the lands were situate and contended that the lands did not belong to the mosque, and that the applicant was not the manager. The District Judge felt a doubt as to whether he had jurisdiction to entertain the application unless a suit was properly framed and filed under section 539 of the Civil Procedure Code (Act XIV of 1882), and referred the point to the High Court under section 617 of the Code.

The High Court refused to answer the reference, being of opinion that no reference under section 617 could be made on such an application. Sections 617 and 647 of the Civil Procedure Code apply when doubts arise in the proceeding of a suit or appeal or execution or other proceeding. Section 617 was not intended to provide for suppositious cases, which do not naturally arise in a proper proceeding before the Court.

MAHAMAD HÁJI *v.* AHMADBHÁI ... ... ... (1900) 25 Bom. 327

———SECS. 545, 546—*Practice—Decree—Appeal—Stay of execution of decree.*] In order to obtain a stay of execution of a decree directing the payment of money, the applicant must satisfy the Court on affidavit that substantial loss may result to him unless execution is stayed.

H. H. THE GÁIKWÁR SIRKÁR *v.* GHÁNDI KATCHARÁBHÁI... (1899) 25 Bom. 243

———SECS. 545, 546—*Practice—Decree—Execution—Stay of execution.*] An Appellate Court cannot pass an order under section 546 of the Civil Procedure Code (Act XIV of 1882) for a stay of execution of a decree under appeal until an order has been made for the execution of the decree.

JANÁRDAN *v.* NILKANTH ... ... ... (1901) 25 Bom. 583

———SECS. 545, 546—*Surety—Liability, mode of enforcing.*] The mode of enforcing payment by a surety who has rendered himself liable under section 545 (*c*) or section 546 of the Civil Procedure Code (Act XIV of 1882) is by a summary process in execution and not by means of a separate suit.

JAMSEDJI *v.* BÁWÁBHÁI ... ... ... (1900) 25 Bom. 409

———SEC. 544—*Limitation Act (XV of 1877), sec. 5—Practice—Appeal—Joint appellants—Presentation of appeal beyond time—Affidavit excusing delay in appealing made by only one of the appellants stating reasons personal to himself—Appeal admitted—Variation of decree on a point affecting other appellants, but not the appellant who made the affidavit—Variation not allowed.*

*See* APPEAL ... ... ... ... ... ... 649

———SEC. 586—*Practice—Small Cause Court—Jurisdiction of—Question of title—Provincial Small Cause Courts Act (IX of 1887), sec. 23—Claim to possession of land when title to land disputed—Second appeal.*] The plaintiff sued to recover Rs. 75 as the *utpan* (income) of certain lands. In his defence the defendant raised the question of the title to the land. The plaintiff obtained a decree, which was confirmed in appeal.

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*Held*, that the suit, although raising the question of title, was a suit cognizable by a Small Cause Court, and that therefore under section 586 of the Civil Procedure Code (Act XIV of 1882) no second appeal lay.

VINÁYAK *v.* KRISHNARÁO ... ... ... (1901) 25 Bom. 625

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS. 600—*Certificate that appeal to the Privy Council involves a question of law—Privy Council—Practice.*

*See* PRIVY COUNCIL ... ... ... ... ... 332

COIN—*Customary coin—Criminal Procedure Code (Act V of 1898), sec. 517—Disposal of stolen property on conviction of the thief—Bábáshái coin—Legal tender.*

*See* CRIMINAL PROCEDURE CODE ... ... ... ... 702

COMPANY—*Powers of Directors to lend money on equitable mortgage—Bank of Bombay—Presidency Banks Act (XI of 1876), secs. 36 and 37.*

*See* BANK OF BOMBAY ... ... ... ... ... 52

CONFESSION—*Confession of an accused while in custody of the Police—Duty of Magistrate when such confession is made—Sessions Judge—Duty of—Criminal Procedure Code (Act V of 1898), sec. 164 (3)—Evidence Act (I of 1872), sec. 24—Evidence.*

*See* EVIDENCE... ... ... ... ... ... 543

———*Retracted confession—Evidence Act (I of 1872), secs. 24, 30 and 33—Deposition of a deceased witness—Admissibility of such deposition in subsequent proceedings—Evidence.*] A confession duly recorded and certified under section 164 of the Criminal Procedure Code (Act V of 1898) is admissible in evidence against the person making it unless shut out by the provisions of section 24 of the Indian Evidence Act (I of 1872).

A mere subsequent retraction of a confession which is duly recorded and certified by a Magistrate is not enough in all cases to make it appear to have been unlawfully induced.

The law in India is not identical with the law in England on the relevancy and admissibility of confessions.

*Imperatrix* v. *Balya Dagdu* ((1898) Cr. Rul. No. 3) dissented from.

*Reg.* v. *Balvant* ((1874) 11 B. H. C. R., 173) followed.

Where a witness for the prosecution was examined before a Committing Magistrate, but was not cross-examined, and then died before the case came on for trial to the Sessions Court, and his deposition was tendered in evidence at the trial.

*Held*, that the deposition was admissible under section 33 of the Evidence Act (I of 1872).

QUEEN-EMPRESS *v.* BASVANTA ... ... ... (1900) 25 Bom. 168

CONSPIRACY—*Cause of action—False evidence not actionable—Conspiracy to give false evidence.*] A mere conspiracy to injure a man without an overt act resulting in the injury does not furnish any cause of action. A conspiracy is not illegal unless it results in an act done which by itself would give a cause of action.

TEMPLETON *v.* LAURIE ... ... ... ... (1900) 25 Bom. 230

CONTRACT—*Construction of contract—Contract indefinite as regards duration—Agreement to pay a certain sum as maintenance—Effect on agreement of defeasance being rendered impossible.*] Gifts or contracts expressed to be for maintenance, and indefinite as regards duration, may be shown by the acts of the parties or other circumstances to be intended to operate in perpetuity; but, *primâ facie*, they are limited to the life either of the grantor or grantee.

The plaintiff, one of a family of Khojas, carried on business with his grandfather Peeroo, his father Nensey, and his two uncles Kassum and Fazul, his share in the business being 2 annas. Amongst their other business the firm was employed as

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contractors and brokers by the defendants' firm. On 30th July, 1894, a deed of dissolution of partnership was drawn up, the basis of which was that the accounts of all the partners should be considered as settled, and that they should mutually release and be released by each other. The agreement stated the pecuniary relations of each of the partners, whether debtor or creditor to the firm, and also the terms on which each should retire and be released. The plaintiff was indebted to the firm, and by the deed it was provided that he should be released from all claims against him, and should release the other partners from all claims he might have. The deed was signed by the other partners, but the plaintiff objected to sign it, on the ground that its terms were unfavourable to him as it made no provision for him and left him dependent on his father, with whom he was then on bad terms. To induce the plaintiff to consent to the dissolution, in which they were interested, the defendants gave him the following letter, dated 4th August 1894: "In consideration of your having at our request signed the agreement of dissolution of partnership made between Peeroo, Nensey, Kassum, Fazul and yourself, and dated 30th July last, we hereby agree to pay you, on behalf of Nensey, a sum of Rs. 500 per month, payable on the first of each month, until such time as your father Nensey makes provision for your maintenance, so as to give thereby himself the above sum every month for such maintenance." The plaintiff thereupon signed the deed of dissolution. Nensey died in March, 1898, without having made may provision for the plaintiff's maintenance.

*Held* (affirming the decision of the High Court) that the liability of the defendants to pay the Rs. 500 a month to the plaintiff came to an end on the death of Nensey. The language of the contract pointed strongly to the life of the intended or supposed grantor as the limit of the benefit, and there was nothing in the position of the parties or the circumstances of the case to give it any other construction.

KARIM NENSEY *v.* HEINRICHS ... ... ... (1901) 25 Bom. 563

CONTRACT—*Contract Act (IX of 1872), sec. 16—Undue influence—Sale—Inadequacy of consideration—Voidable contract.*] Inadequacy of consideration in conjunction with the circumstances of the indebtedness and ignorance of the vendor are facts from which a Court may infer the exercise of undue influence.

BHIMBHAT *v.* YESHWANTRÁO ... ... ... (1900) 25 Bom. 126

——————ACT (IX OF 1872), SEC. 43—*Partners—Practice—Procedure—Civil Procedure Code (Act XIV of 1882), sec. 153—Joint debtors—Suit against several joint debtors—Judgment against one joint debtor who admits claim does not bar suit against others.*

*See* CIVIL PROCEDURE CODE ... ... ... ... 378

——————————————SEC. 261—*Guarantee—Liability of surety—Right of surety to indemnity—Partnership.*

*See* PARTNERSHIP ... ... ... ... ... 606

CONVERT—*Hindu law—Adoption—Gift of a son in adoption by a Hindu convert to Mahomedanism—Validity of such adoption*

*See* HINDU LAW, ADOPTION ... ... ... ... 551

CO-SHARER—*Adverse possession—Joint family—Adverse possession of a co-sharer as against another co-sharer—Burden of proof—Limitation.*

*See* ADVERSE POSSESSION ... ... ... ... 362

COSTS—"*Costs in the cause*", *meaning of such order made in an interlocutory proceeding.*] Where in an interlocutory proceeding the order as to costs is that the costs thereof shall be "costs in the cause," these words do not mean that costs will follow the

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event, but that those costs remain to be dealt with by the Court at the hearing, the Judge at the trial having still power to deal with such costs.
TEMPLETON *v.* LAURIE ... ... ... ...(1900) 25 Bom. 230

CRIMINAL PROCEDURE—*Offence triable with the aid of assessors tried in fact by a Jury—Tried by Jury—Appeal on a matter of fact—Practice—Procedure—Criminal Procedure Code* (*V of* 1828), *Secs.* 269 *and* 418.
*See* CRIMINAL PROCEDURE CODE ... ... ... ... 689

———*Pardon tendered and accepted—Evidence given and pardon withdrawn by Magistrate—Forfeiture of Pardon must be proved—When may forfeiture be declared and pardon withdrawn—Criminal Procedure Code (Act V of* 1898), *Secs.* 337 *and* 339.
*See* CRIMINAL PROCEDURE CODE ... ... ... ... 675

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 4 (*h*), CHAP. XV, PART B, SECS. 191, 195, 196, 198, 199, AND SEC. 345—*Penal Code* (*Act XLV of* 1860), *sec.* 499, *Expl. I—Defamation of wife—Complaint by husband—Aggrieved party.*] *Held* by the Full Bench (Ranade, J., dissenting) that under the provisions of the Criminal Procedure Code (Act V of 1898) a husband is entitled to be complainant where the alleged offence is defamation, imputing unchastity to his wife.
CHHOTALAL *v.* NATHABHAI ... ... ... (1900) 25 Bom. 151

———SECS. 145 AND 526—*Transfer of a case—Criminal case—Bias of Judge—Magistrate's powers under sec.* 145—*Breach of peace—Rights of the parties—Practice.*] The provisions of section 526 of the Criminal Procedure Code (Act V of 1898) do not give any power to direct the transfer of any proceedings initiated under section 145 of the Code. Such proceedings do not constitute a "criminal case" within the meaning of section 526 of the Code. A criminal case means a case arising out of, and dealing with, some crime already committed. It does not include proceedings taken for the prevention of crime.

Under section 145 of the Code a Magistrate is not at liberty to go into the merits of the claims of any of the parties to the dispute, to a *right* to possess the subject thereof. He can decide only the fact of possession at the date of the order requiring the parties to put in their statements.

The parties cannnot be called upon to furnish a statement of their rights, nor can the Magistrate take, as the basis of any action he may finally decide upon, any conclusion at which he may arrive, or at which he may have arrived, as to the respective titles of the parties.
*IN RE* PANDURANG GOVIND ... ... ... (1900) 25 Bom. 179

———SEC. 164 (3)—*Evidence—Confession—Confession of an accused while in custody of the police—Duty of Magistrate when such confession is made—Sessions Judge—Duty of—Evidence Act* (I *of* 1872), *Sec.* 24.] When an accused person has been in custody of the Police and has made a confession, it is important that the Magistrate before recording such confession under section 164 of the Criminal Procedure Code (V of 1898) should ascertain how long the accused has been in custody. If there is no record of that fact, it is the duty of the Sessions Judge, before holding the confession relevant under section 24 of the Evidence Act (I of 1872), to send for the Magistrate and satisfy himself on the point.
QUEEN-EMPRESS *v.* NARAYAN ... ... (1901) 25 Bom. 543

———SECS. 196 AND 235—*Sanction to prosecute—Joinder of charges—Trial for more than one offence—Offences falling under two definitions.*] The accused was committed for trial before a Sessions Court on a charge of abetment of dacoity under section 116 of the Indian Penal Code (Act XLV of 1860). In the course of the trial the Assistant Sessions

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Judge added an alternative charge under section 511 of the Code and sentenced the accused under sections 395, 116 and 511 of the Indian Penal Code (Act XLV of 1890).

In appeal the Sessions Judge held that the evidence disclosed the offence of an attempt to commit the offence of collecting arms, &c., with intention of waging war against the Queen, under section 122, and as no charge under that section could be framed for want of the sanction of Government under section 196 of the Criminal Procedure Code (Act V of 1898), the accused could not be brought to trial at all. He, therefore, reversed the conviction and acquitted the accused.

*Held*, (reversing the order of acquittal), that the mere fact that no charge for the graver offence under section 122 of the Indian Penal Code (Act XLV of 1860) could be framed for want of Government sanction, did not render the trial for the minor offence of attempting or abetting dacoity either irregular or illegal.

Per FULTON, J. :— According to the 2nd clause of section 235 of the Criminal Procedure Code (Act V of 1898), if the accused abetted an offence under section 122 of the Penal Code, and by the same speech also attempted or abetted the offence of dacoity, he could be tried for each of these offences; but as that section is controlled, as regards the offence against the State, by the provisions of section 196 of the Criminal Procedure Code, its operation in this case is restricted to the minor offence for which the accused could legally be charged and tried.

*Queen-Empress* v. *Karigowda* ((1894), 19 Bom., 15), and *In re Nagarji* ((1894), 19 Bom., 340) distinguished,

QUEEN-EMPRESS *v.* ANANT PURANIK ... ... (1900) 25 Bom. 90

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 250—*Application for an order that a person should give security to keep the peace—Refusal of application—Compensation under section 250 of Criminal Procedure Code (V of 1898).*] To justify the application of section 250, a person must be accused before a Magistrate of an offence triable by a Magistrate.

A applied to a Magistrate of the First Class to order B to give security to keep the peace (section 107, Criminal Procedure Code, 1898). The Magistrate after inquiring into the matter discharged B under section 119 of the Criminal Procedure Code and directed A to pay B Rs. 50 as compensation under section 250 of the Code.

*Held*, that the award of compensation was illegal. The institution of proceedings under section 107 of the Criminal Procedure Code was not an accusation of an offence triable by a Magistrate within the meaning of section 250 of the Code.

*Queen-Empress* v. *Lakhpat* ((1893) 15 All 365) followed.

*IN RE* GOVIND HANMANT ... ... ... (1900) 25 Bom. 48

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—SECS. 269 AND 418—*Offence triable with the aid of assessors tried in fact by a jury—Trial by jury—Appeal on a matter of fact—Practice—Procedure.*] Under section 418 of the Criminal Procedure Code (V of 1898) no appeal lies on matters of fact where an accused person is convicted by a jury on a charge which ought to have been tried with the aid of assessors.

An accused person was charged with and tried for offences under sections 302, 304 and 325 of the Penal Code (Act XLV of 1860). Under the first of those charges he was triable by a jury. Under the latter two he was triable with the aid of assessors. He was, however, tried for all three offences by a jury who found him guilty on the third charge. The Judge accepted the verdict and sentenced the accused to four years' rigorous imprisonment. The accused appealed.

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*Held*, by a Full Bench that under section 418 an appeal lay in this case on matters of law only and not on matters of fact.

*Per Jenkins, C.J.*—The words in section 418 of the Criminal Procedure Code, 1898, "when the trial was by jury" mean "when the trial in fact was by jury" and not "when the trial should have been by jury."

KING-EMPEROR v. PARBHUSHANKAR ... ... (1901) 25 Bom. 680

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECS. 284, 285 AND 537—*Trial with aid of assessors—Trial with the aid of one assessor only—Legality of such trial—Assessors.*] In a case triable by a Court of Session with the aid of assessors, one of the assessors being ill, the trial commenced and ended with only one assessor.

*Held*, that there was no legal trial, that the proceedings must be set aside and a new trial directed.

Section 537 of the Criminal Procedure (Act V of 1898) had no application to such a case, as the Court was not properly constituted.

KING-EMPEROR *v.* JAYRAM ... ... ... (1901) 25 Bom. 694

———————————SECS. 337 AND 339—*Pardon tendered and accepted—Evidence given and pardon withdrawn by Magistrate—Forfeiture of pardon must be proved—When may forfeiture be declared and pardon withdrawn.*] A committing Magistrate having, under section 337 of the Criminal Procedure Code (V of 1898), tendered a pardon to one of three accused persons, examined him as a witness. Subsequently, however, the Magistrate, under section 339 of the Code, withdrew the pardon on the ground that the accused had wilfully concealed a certain fact connected with the offence, and he committed him along with the other accused for trial at the Court of Sessions, where he was found guilty. In giving judgment the Sessions Judge expressed his opinion that the withdrawal of the pardon by the Magistrate was illegal, (1) because such withdrawal could not be made until the close of the trial and should be made by the Court of Sessions, and (2) because the fact, the alleged concealment of which was the ground of the withdrawal, had not been proved. The accused, however, was found guilty and sentenced. On appeal to the High Court—

*Held*, that the conviction and sentence should be set aside on the ground that it had not been proved that the pardon had been forfeited under section 339 of the Criminal Procedure Code (V of 1898). The alleged fact, the concealment of which was the ground for withdrawing the pardon, had not been proved. If the pardon which had been granted had not been forfeited under section 339, it was still in force and the accused should be discharged.

As the law stands the question in such cases is whether the accused has forfeited his pardon by some act of his own. The question is one of fact in which the Magistrate may hold one opinion and the Sessions Judge another as may happen in the case of any other question of fact in issue in the case. The Sessions Court has to determine for itself on the evidence whether the pardon has been forfeited: for if not, the accused, who has accepted such pardon, cannot be tried.

*Quære.*—Whether the examination at the committal proceedings before the Magistrate of a person who had accepted a pardon satisfies clause 2 of section 337 of the Code which provides that every such person shall be examined as a witness "in the case" or whether such person must be examined as a witness at the "trial."

*Queen-Empress* v. *Bhau* (1898) 23 Bom. 493 doubted.

KING-EMPEROR *v.* BALA ... ... ... (1901) 25 Bom. 675

———————————SECS. 337 AND 494—*Withdrawal of prosecution—Discharge—Acquittal—Evidence—Discharged persons called as witnesses—Competent witness—practice.*] Where the Public Prosecutor with the

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consent of the Court withdrew from the prosecution of two out of several accused persons tried jointly for an offence under section 4 of the Gambling Act (Bombay Act IV of 1887), and the two accused were thereupon discharged under section 494 of the Criminal Procedure Code (Act V of 1898) and then examined as witnesses for the prosecution.

*Held*, (Whitworth, J., dissenting), that the persons so discharged were competent witnesses.

QUEEN-EMPRESS *v.* HUSSEIN HAJI ... ... (1900) 25 Bom 422

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SEC. 517—*Disposal of stolen property on conviction of the thief—Babashahi coin—Legal tender—Customary coin.*] A witness for the prosecution in the case of theft produced a sum of money in Babashahi (Baroda) coin (part of the stolen property) which the accused had paid to him in satisfaction of a debt. The accused was convicted, and at the close of the trial the Court, under section 517 of the Criminal Procedure Code (V of 1898), ordered the money to be restored to the complainant from whom it had been stolen.

*Held*, that the order was right. The stolen coins were not current coin of the realm and was neither by Statute nor by the law of merchants in British India a legal tender. The property in them did not, therefore, pass by mere delivery, but remained in the complainant.

*Collector of Salem* (1873) 7 *Mad. H. C. R.* 233, and *Empress* v. *Joggessur Mochi* (1878) 3 *Cal.* 379 distinguished.

*IN RE* MATHUR LALBHAI ... ... ... (1901) 25 Bom. 702

DAUGHTER-IN-LAW—*Her claim to maintenance against self-acquired property devised by her father-in-law—Hindu Law—Maintenance.*

*See* HINDU LAW; MAINTENANCE ... ... ... ...263

DEBTOR AND CREDITOR—*Fraudulent Conveyance—Sale by debtor in order to defeat an execution—Intent to defeat or delay creditors—Transfer of Property Act (IV of* 1882), *Sec.* 53-13 *Eliz. C.* 5 *and* 27 *Eliz. C.* 4.

*See* FRAUDULENT CONVEYANCE ... ... ... ...202

DECREE—*Civil Procedure Code (XIV of 1882), Sec. 295—Rateable distribution under several decrees—Decrees must be against same judgment-debtor—Decree against judgment-debtor—Subsequent decree against his legal representative and his estate.*

*See* CIVIL PROCEDURE CODE ... ... ... ... ...494

————*Mortgage—Account of decree included in the mortgage—Agreement to give time—Satisfaction—Civil Procedure Code (XIV of* 1882), *Sec* 257*A.*

*See* CIVIL PROCEDURE CODE ... ... ... ...252

DEFAMATION OF WIFE—*Complaint by husband—Aggrieved party—Criminal Procedure Code (Act V of* 1898), *sec.* 4 (*h*), *Chap. XV, Part B, secs.* 191, 195, 196, 198, 199, *and sec.* 345—*Penal Code (Act XLV of* 1860), *Sec.* 499, *Expl. I.*

*See* CRIMINAL PROCEDURE CODE ... ... ... ...151

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SEC. 3, CL. (*x*)—*Land Revenue—Suit for land revenue not a suit for rent.*] A suit for land revenue does not fall under section 3 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The liability for land revenue does not spring from a contractual engagement, and a claim in respect thereof is not one for rent or damages within the meaning of clause (*x*) of section 3 of the Act.

SHEIK GULAM JILANEE *v.* KASHINATH BAPUJI ... (1900) 25 Bom. 244

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DOCUMENT—*Alteration of a document—Material alteration—Material alteration in a written acknowledgment of a debt does not render it inoperative and ineffective— Limitation.*] The rule of English law that a material alteration of a document by a party to it after its execution without the consent of the other party renders it void, is in force in India.

This rule does not apply to documents which are not the foundation of a plaintiff's claim, but are merely evidence of a defendant's pre-existing liability.

A written acknowledgment of his liability by a debtor which is intended merely to save the bar of limitation and not to give a right of action, is not within the rule.

ATMARAM *v.* UMEDRAM ... ... ... (1901) 25 Bom. 616

ENCROACHMENT—*Estoppel—Acquistion of land under sec.* 26 *of Bombay Act II of* 1876—*Vendor and Purchaser—Land Revenue in Bombay—Assessment—Enhancement of assessment—Bombay Act II of* 1876—*Purchase—land from* Government.

*See* LAND REVENUE ... ... ... ... ... 752

ESTOPPEL—*Bank—Banker and customer —Pass-book—Cheque lodged by customer for collection —Effect of entry in customer's pass-book of such cheque as if collected.*

*See* BANK ... ... ... ... ... ...499

ESTOPPEL—*Evidence Act* (*I of* 1872), *Sec.* 115—*Land Revenue in Bombay—Assessment—Enhancement of Assessment—Bombay Act II of* 1876—*Sale of land by Government to a purchaser assessed at a certain rate—Subsequent enhancement —Vendor and Purchaser.*

*See.* LAND REVENUE ... ... ... ... ... 714

———*Land Revenue in Bombay—Assessment—Enhancement of assessment—Bombay Act II of* 1876—*Purchase of land from Government—Encroachment—Acquisition of land under sec.* 26 *of Bombay Act II of* 1876—*Vendor and Purchaser.*

*See.* LAND REVENUE ... ... ... ... ... 752

EVIDENCE—*Confession—Confession of an accused while in custody of the Police—Duty of Magistrate when such confession is made—Sessions Judge—Duty of—Criminal Procedure Code* (*Act V of* 1898), *Sec.* 160 (3)—*Evidence Act* (*I of* 1872), *Sec.* 24.] When an accused person has been in custody of the Police and has made a confession, it is important that the Magistrate before recording such confession under section 164 of the Criminal Procedure Code (V of 1898) should ascertain how long the accused has been in custody. If there is no record of that fact, it is the duty of the Sessions Judge, before holding the confessions relevent under section 24 of the Evidence Act (I of 1872), to send for the Magistrate and satisfy himself on the point.

QUEEN-EMPRESS *v.* NARAYAN ... ... (1901) 25 Bom. 543

———*Confession—Retracted confession—Evidence Act* (*I of* 1872), *Secs.* 24, 30 *and* 33—*Deposition of a deceased witness—Admissibility of such deposition in subsequent proceedings.*] A confession duly recorded and certified under section 164 of the Criminal Procedure Code (Act V of 1898) is admissible in evidence against the person making it unless shut out by the provisions of section 24 of the Indian Evidence Act (I of 1872).

A mere subsequent retraction of a confession which is duly recorded and certified by a Magistrate is not enough in all cases to make it appear to have been unlawfully induced.

The law in India is not identical with the law in England on the relevancy and admissibility of confessions.

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*Imperatrix* v. *Balya Dagdu* (1898) Cr. Rul. No. 3) dissented from.
*Reg.* v. *Balvant* (1874) 11 B. H. C. R., 137) followed.

Where a witness for the prosecution was examined before a Committing Magistrate, but was not cross-examined, and then died before the case came on for trial to the Sessions Court, and his deposition was tendered in evidence at the trial,

*Held*, that the deposition was admissible under section 33 of the Evidence Act (I of 1872).

QUEEN-EMPRESS *v.* BASVANTA ... ... (1900) 25 Bom. 168

EVIDENCE—*Discharged persons called as witnesses—Competent witness—Practice—Criminal Procedure Code* (*Act V of* 1898), *Secs.* 337 *and* 494—*Withdrawal of prosecution—Discharge—Acquittal.*] Where the Public Prosecutor with the consent of the Court withdrew from the prosecution of two out of several accused persons tried jointly for an offence under section 4 of the Gambling Act (Bom. Act IV of 1887), and the two accused were thereupon discharged under section 494 of the Criminal Procedure Code (Act V of 1898) and then examined as witnesses for the prosecution.

*Held*, (Whitworth, J., dissenting) that the persons so discharged were competent witnesses.

QUEEN-EMPRESS *v.* HUSSEIN HAJI ... ... (1900) 25 Bom. 422

———*Documentary evidence—Old reports of panchâits—Claim to a vatan existing from Maratha rule.*] Title to an inheritance devolving upon a single heir was contested between the parties representing, respectively, two lines of descent from the same ancestor. He had three sons whose posterity continued in three lines till the extinction of the senior line of descendants in 1877. On this, the last of the younger of the two surviving lines claimed to have his right to the succession declared.

The question was whether an ancestor of the claimant had adopted as his son a member of the family born in the senior line. The decision depended on the weight to be attached to entries in old documents. These were reports by panchâits to the Collector of the years 1819—21, preserved among the Mámlatdár's records, and they related to questions of succession between the heads of the family lines, disputing then, as were their successors now. The authenticity of the report was not impeached. But the adoption now in question could hardly have been the point then in dispute, and the entries as to it had been tampered with.

The enquiry, however, into the history of the family was minute, it took place before a competent local tribunal, and the report was signed by the plaintiff's grandfather. The findings were held strong evidence in matters of family pedigree. The decision of the High Court, which had dismissed the suit, (after bringing home the fact of the part obliteration of the entry to the plaintiff), was, on the evidence, maintained.

AJAB SINGH *v.* NANABHAU ... ... ... (1899) 25 Bom. 1

———*Dying declaration—Indian Penal Code* (*Act XLV of* 1860), *Sec.* 396.] Appellant was convicted and sentenced to transportation for life on a charge of dacoity. The most material evidence for the prosecution was the statement, in the nature of a dying declaration, made to the jamádár of Police by one Fakiria Shimpi, who received wounds during the dacoity and who died before the trial commenced.

The Assistant Surgeon, who made the *post-mortem* examination on the deceased, was not called, being on leave, but the Civil Surgeon, on a persual of the notes left by the Assistant Surgeon, gave evidence that the cause of death of the deceased was pneumonia aggravated by a stab. In the notes themselves no cause of death

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was given, and there was no evidence as to how the pneumonia was aggravated. No explanation was given as to how the opinion was formed that the pneumonia was aggravated by the injury, and there was nothing in the notes to support it.

*Held*, that the statement of the deceased ought not to have been admitted in evidence in the absence of evidence to show that his death was caused or accelerated by the wounds received at the dacoity, or that the dacoity was the transaction which resulted in his death.

IMPERATRIX *v.* RUDRA ... ... ... (1900) 25 Bom. 45

EVIDENCE—*False evidence not actionable—Conspiracy to give false evidence—Cause of action.*

No civil action lies against a witness for giving false evidence, and the fact that the evidence is given in pursuance of a conspiracy to obtain the conviction of the accused person does not make any difference. The only remedy against a false witness is a prosecution for perjury.

Where, therefore, a plaintiff sued three defendants for giving false evidence against him in a trial at Bombay, alleging that it was done in pursuance of a conspiracy entered into at Hyderabad to obtain his conviction.

*Held*, that the plaint disclosed no cause of action.

TEMPLETON *v.* LAURIE ... ... ... (1900) 25 Bom. 230

EVIDENCE ACT (I OF 1872), SEC. 24—*Confession—Confession of an accused while in custody of the Police—Duty of Magistrate when such confession is made—Session Judge—Duty of—Criminal Procedure Code (Act V of 1898), Sec. 160 (3)—Evidence.*

*See* EVIDENCE ... ... ... ... ... 543

———————————SEC. 32, CL. 4 AND SEC. 42—*Judgment of Foreign Court—False statement in trade-mark—Deception—Evidence—Admissibility of judgment of Foreign Court—Trade-mark.*

*See* TRADE-MARK ... ... ... ... ... 433

———————————SEC. 110—*Effect of plaintiffs' possession—Presumption of title—Evidence—Possession—Declaration of title—Suit by person in possession for declaration of title—Burden of proof.*] The plaintiffs brought this suit in 1898 for a declaration that certain land in the village of S. belonged to them, and that they might be confirmed in possession. They alleged that they purchased the land in July 1888, from the pátel of the village, and had been in possession ever since, and that their vendor had previously been in possession. They now sued because their possession had been threatened by the orders of Government officials. It was admitted that the plaintiffs had been in actual possession since 1888.

The District Judge held that the burden of proof of title to the land lay upon the plaintiffs. He was of opinion that they had failed to prove it, and he dismissed the suit.

*Held*, *per* JENKINS, C.J., and RANADE, J. (WHITWORTH, J., dissenting), that the plaintiffs being in possession (not shown to have wrongfully originated) such possession was good against the whole world except a person who could show better title; that the burden of proving such title lay therefore upon the defendant; that he had failed to prove it; and that, therefore, the plaintiffs were entitled to the declaration sued.

*Per* WHITWORTH, J.:—That the evidence did not show such possession in the plaintiffs as under section 110 of the Evidence Act (I of 1872) shifted the burden of proof upon the defendant; that, prior to the alleged sale to the plaintiffs in 1888,

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the defendant had been in the position of an absentee owner of the land in question represented partly by the village officers and party also by the village community, and that he might be said to be in possession; that the sale to the plaintiffs in 1888 by the patel of the village, who should have protected the defendant's interests, was a wrongful act; that the plaintiffs were therefore not relieved from the burden of proving their title, and that they had not proved it.

*Per* RANADE, J.:—When a person in possession of land has been dispossessed and sues to recover it, the fact of his previous possession will not entitle him to a decree unless he sues under section 9 of the Specific Relief Act (I of 1877) within six months of the date of dispossession. If he sues after the six months have expired, he must prove a *primâ facie* title. In such a case he is entitled to a decree unless a superior title is proved on the other side. It is in reference to such cases that it has been held that possession is evidence of title, and that the plaintiff who proves such possession and subsequent disturbance, shifts the burden of proof on the defendant when the *primâ facie* title is made out. When no such *primâ facie* title is made out by the plaintiff who asks for a declaratory decree, he cannot obtain that decree on the mere ground that he was in possession and the defendant had no title. Mere wrongful possession is insufficient to shift the burden of proof.

HANMANTRAV *v.* SECRETARY OF STATE FOR INDIA ... (1900) 25 Bom. 287

EXECUTION—*Decree—Sale in execution—Civil Procedure Code (Act XIV of 1882), Secs. 310 A and 244 (c)—Order refusing to set aside a sale—Appeal from such order.*] An appeal lies from an order passed under section 310A of the Civil Procedure Code (Act XIV of 1882), refusing to set aside a sale where the dispute relates to the execution, discharge or satisfaction of a decree and thus comes within section 244 (c) of the Code.

MURLIDHAR *v.* ANANDRAO ... ... ... (1900) 25 Bom. 418

———————*—Sale—Civil Procedure Code (Act X of 1877), Secs. 234, 248, 311—Decree—Death of judgment-debtor after decree but before execution—Sale in execution without notice to legal representatives—Notice given to wrong person—Title of purchaser at such sale—Sale irregular but not a nullity—Suit to set aside such sale must be brought within one year—Limitation (Act XV of 1877), art. 12.*] An account and redemption, of a mortgage effected in 1877, were refused where the mortgaged property had since then been sold at a judicial sale in execution of a decree. The plaintiffs were the heirs representing the mortgagor. The purchaser at the sale was the mortgagee. The sale took place after notice had been wrongly served upon a person who was not the legal representative of the judgment-debtor's estate. The executing Court had erroneously decided that he was to be treated as such representative.

*Held*, that the judicial sale was not a nullity, and could not be treated as invalid, notwithstanding this irregularity, even though a material one, for the jurisdiction of the Court to execute had been complete throughout. It had not been lost by reason of the above error, and had empowered the Court to decide wrongly as well as rightly.

On an irregularity such as this the aggrieved party had his remedy by taking within due time the course prescribed in section 311 of the Civil Procedure Code (X of 1877), or suing for getting the order set aside. That course had not been followed within the period fixed by art. 12, schedule II, of the Limitation Act XV of 1877, one year from the confirmation of the sale, which was valid, and formed a defence to this suit.

*Baswantapa* v. *Ranu* ((1884) 9 Bom. 86) distinguished. There the Court actually had not the jurisdiction which it purported to exercise. Here the Court having jurisdiction had by its decree established the debtor's liability and was in the process of working it out, against his estate, when the irregularity took place.

MALKARJUN *v.* NARHARI ... ... (1900) 25 Bom. 337

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EXECUTION—*Stay of execution—Civil Procedure Code (XIV of 1882). Secs.* 545-546 *—Practice—Decree.*

*See* PRACTICE ... ... ... ... ... 583

———, *Stay of—Civil Procedure Code (XIV of 1882), Secs.* 545, 546— *Practice—Decree—Appeal.*

*See* PRACTICE ... ... ... ... ... 243

EXECUTOR—*Will—Construction—Suit by legattee against executor for arrears of rent—Limitation.*

SEE WILL ... ... ... ... ... 429

FIXTURES—*Goods and chattels—Registration of mortgage—Registration Act (III of 1877), Sec.* 17—*Insolvency—Property subject to mortgage in possession of insolvent at date of insolvency—Indian Insolvency Act (Stat.* 11 *and* 12 *Vict.,* c. 21), *Sec.* 23—*Reputed ownership.*

*See* INSOLVENCY ... ... ... ... ... 659

FOREIGNERS—*Non-resident foreigners defendants—Civil Procedure Code Act XIV of* 1882), *Sec.* 17, *Expl. III—Jurisdiction—Cause of action arising within jurisdiction—Letters Patent, Cl.* 12—*Small Cause Courts Act (IX of* 1887), *Sec.* 18.

*See* JURISDICTION ... ... ... ... 528

FRAUDULENT CONVEYANCE—*Sale by debtor in order to defeat an execution—Intent to defeat or delay creditors—Transfer of Property Act (IV of* 1882), *Sec.* 53—13 *Eliz., Cap.* 5, *and* 27 *Eliz., Cap.* 4.] Bhagwant filed a suit against Ganpati, the manager of a Hindu undivided family, to recover a sum of money due to him, and on the same day obtained an order for attachment before judgment of certain property belonging to the defendant and his family. Before the attachment was actually effected, the property in question and other property was sold to Kedari (defendant No. 1). The deed of conveyance was executed on the day the suit was filed, and the order for attachment was made and notice of the order for attachment was given both to the vendor and the purchaser before the deed was registered, but before the attachment was actually effected.

Subsequently the plaintiff obtained a money decree in his suit and then filed this suit against the vendor and purchaser, praying for a declaration that the conveyance was fraudulent and void, and that the property was liable to attachment in execution of his decree.

The lower Courts dismissed the suit, holding that the sale to the vendee was valid although made with the object of defeating the anticipated attachment of the plaintiff. On appeal to the High Court,

*Held,* (confirming the decree) that clause 2 of section 53 of the Transfer of Property Act (IV of 1882) did not apply, as it was not found that the transfer in question was made fraudulently or for a grossly inadequate consideration.

*Held,* also, that although the object of the transfer was to defeat an anticipated execution, that did not show that the intent was to defeat or delay the creditors so as to render clause 1 of section 53 applicable. Such intent would probably be inferred if there was such an inadequacy of consideration as to bring the case within clause 2 of section 53.

Clause 3 of the section only comes into operation when the facts justify the application of clause 1 or clause 2.

BHAGWANT *v.* KEDARI ... ... ... (1900) 25 Bom. 202

GUARANTEE—*Contract Act (IX of* 1872), *Sec.* 264—*Liability of surety—Rights of surety to indemnity—Partnership.*

*See* PARTNERSHIP ... ... ... ... ... 606

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GUARDIAN—*Minor—Guardian appointed of property of a minor who was a member of a joint Hindu family and the property was joint property—Sanction given for sale of joint property in which minor had a share—Jurisdiction of High Court.*
*See* MINOR ... ... ... ... ... ... 353

GUARDIAN AND WARD—*Minor—Practice—Procedure—Succession Certificate Act (VII of 1889), Secs. 6, 7 and 9—Summary proceedings—Questions of disputed adoption not to be determined in such proceedings—Security—Guardians's right to certificate on behalf of minor.*

An application by a guardian of a minor is not contemplated by section 6, clause (*d*), of Act VII of 1889, which only permits the petitioner, who claims the right for himself, to apply.
GULABCHAND *v.* MOTI CHATRAJI ... ... (1900) 25 Bom. 523

HIGH COURT—*Reference to High Court—Civil Procedure Code (XIV of 1882) secs. 617, 647 and 539—Practice—Procedure.*
*See* PRACTICE ... ... ... ... ... ... 327

HINDU LAW—*Adoption—Adoption by a mother succeeding to her son who has been married—Ceremonial competency of the son no bar to the adoption—Only limitation to a mother's right to adopt.*] A mother succeeding as heir to her deceased son who has left neither widow nor issue, is competent to adopt, notwithstanding the fact that her deceased son had attained ceremonial competency by marriage investiture or otherwise before his death.

The real limitation on a mother's right to adopt when she succeeds as heir to her son does not depend upon the investiture, marriage or ceremonial competency of her deceased son, but upon the question whether by such adoption she derogates from any other rights save her own.

Jivaji Krishna, the holder of a Kulkarni vatan, mortgaged the vatan lands to the defendants in 1879. He died in 1884 at the age of thirty without issue. His wife had predeceased him and his mother Tulsava therefore succeeded as heir. In 1894 she adopted the plaintiff and died shortly afterwards. In 1896 the plaintiff brought this suit to set aside the mortgage and recover the mortgaged lands. The defendants contended (*inter alia*) that Tulsava's right to adopt had been extinguished because her deceased son had been married and had attained ceremonial competency, and that the plaintiff's adoption was therefore invalid and his suit could not be maintained.

*Held*, that the plaintiff's adoption by Tulsava was valid, inasmuch as it only affected her own interests and did not affect the vested rights of others.
VENKAPPA *v.* JIVAJI KRISHNA ... ... (1900) 25 Bom. 306

———*Adoption—Dwyamushyayana adoption—Power of a Hindu widow to give away an only son in adoption.*] A Hindu widow can make a valid gift of her only son in adoption.

The power of giving and taking an only son in adoption in the *Dwyamushyayana* form is not confined to brothers, but may also be exercised by their widows.

*Lakshmappa* v. *Ramava* ((1875) 12 B. H. C. R., 364) explained and distinguished.
KRISHNA *v.* PARAMSHRI ... ... ... (1901) 25 Bom. 537

———*Adoption—Gift of a son in adoption by a Hindu convert to Mahomedanism—Validity of such adoption.*] A Hindu father does not lose his capacity to give his son in adoption by reason of his conversion to Mahomedanism.

*Quœre*, whether this holds good in the case of Brahmans, among whom the *Datta-homa* ceremony is necessary.

Plaintiff, a Rajput, whose natural mother was dead and whose natural father had become a convert to Mahomedanism, was given in adoption by his uncle to whom the natural father had given the necessary authority.

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*Held*, that the adoption was valid.
SHAMSING *v.* SANTABAI ... ... ... (1901) 25 Bom. 551

HINDU LAW—*Inheritance—Brother's grandson preferred to widow of a daughter's son.*] The widow of a daughter's son is not entitled to succeed to the estate of her husband's maternal grandfather in preference to the maternal grandfather's separated brother's grandson.
VALLABHDAS *v.* SAKARBAI ... ... ... (1900) 25 Bom. 281

———*Joint family—Self-acquisition—Partition—Burden of proof—Findings of fact—Findings based upon presumptions only—Second appeal—Practice.*] In a suit for partition brought in 1898 the plaintiffs claimed a share in the income of a certain inam village which had been purchased by the defendant in 1873. The defendant pleaded (*a*) that it was his self-acquired property; and (*b*) limitation. The Court of first instance rejected the claim, but in appeal the Judge held that the burden of proving self-acquisition and exclusive enjoyment lay upon the defendant, and that in the absence of such proof the presumption was in favour of the plaintiffs. He therefore reversed the decree and awarded the plaintiffs' claim. On appeal to the High Court,

*Held*, (reversing the decree and remanding the case for re-trial) that the burden of proof lay on the plaintiffs. It was for them to show that the purchase had been made out of ancestral funds and they were also bound to prove that they had been in receipt of their share of the income. That burden could not be shifted on to the defendant, who acquired the property and in whose name and possession it had admittedly been for years.
VINAYAK *v.* DATTO ... ... ... (1900) 25 Bom. 367

———*Maintenance—Daughter-in-law—Her claim to maintenance against self-acquired property devised by her father-in-law.*] The widow of a predeceased unseparated son has no right to maintenance from a person to whom her father-in-law has bequeathed the whole of his self-acquired property.

*Yamunabai* v. *Manubai* ((1899) 23 Bom. 608) referred to and distinguished.
BAI PARVATI *v.* TARVADI DOLATRAM ... ... (1900) 25 Bom. 263

———*Widow—Alienation by widow of land inherited from her husband—Reversioner—Consent of reversioner to alienation—Subsequent claim by son of consenting reversioner to set aside alienation.*] One Govind Bhagwant died, leaving him surviving a widow Radhabai, a sister Bhimabai and her son Venkatesh. Radhabai alienated to the defendant five plots of land inherited by her from her deceased husband. Two of them (Nos. 495 and 496) were sold with the consent of Venkatesh to defray the expenses of his marriage. Their sale-proceeds were received by Venkatesh and the sale-deed was attested by him. The other three plots (Nos. 497, 498 and 499) were relinquished by Radhabai in favour of the defendants, as she was unable to pay Government assessment. The plaintiff was the son of Venkatesh and was born after these transactions. After the sale and relinquishment in favour of the defendants, Bhimabai died, then Venkatesh, and in 1889 Radhabai died. In 1897 the plaintiff brought the present suit as reversionary heir of Govind Bhagwant against the defendant to recover possession of the five plots of land alienated to him by Radhabai.

*Held*, that the sale of the two plots Nos. 495 and 496 by Radhabai to the defendant was good, and the plaintiff was not entitled to recover them. The consent given by Venkatesh, the plaintiff's father who was at the time the only male reversioner in existence, validated the sale.

As to the remaining three plots (Nos. 497, 498 and 499) the plaintiff was entitled to recover them. There was no consent given, or legal necessity for their alienation proved.
VINAYAK *v.* GOVIND ... ... ... (1900) 25 Bom. 129

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HUSBAND AND WIFE—*Defamation of wife—Complaint by husband—Aggrieved-party—Criminal Procedure Code (V of 1898) Sec. 4 (h) Ch. XV pt. B, Secs. 191, 195, 196, 198, 199 and Sec. 345—Penal Code (XLV of 1860), Sec. 499 Expl. I.*

*See* CRIMINAL PROCEDURE CODE ... ... ... ... 151

———————*Parsis—Suit for restitution of conjugal rights—Limitation—Limitation Act (XV of 1877), Sec. 23, Sch. II, Art. 35—Parsi Marriage and Divorce Act (XV of 1865).*] A suit under the Parsi Marriage and Divorce Act (XV of 1865) by a wife for the restitution of her conjugal rights is barred by the lapse of time when restitution has been demanded by her and refused by the husband being of full age and sound mind more than two years prior to the commencement of the suit.

DHANJIBHOY *v.* HIRABAI ... ... ... (1901) 25 Bom. 644

INHERITANCE—*Brother's grandson preferred to widow of a daughter's son—Hindu Law.*

*See* HINDU LAW ... ... ... ... ... ... 281

INSOLVENCY—*Property subject to mortgage of insolvent at date of insolvency—Indian Insolvency Act (Stat. 11 and 12 Vict., c. 21), Sec. 23—Reputed ownership—Fixtures—Goods and chattels—Registration of mortgage—Registration Act (III of 1877), Sec. 17.*] On the 23rd June, 1893, one Vishram Meghji, the owner of a flour mill, mortgaged all the machinery, engines, plant, stock, implements, utensils, trade fixtures, chattels, and effects specified in schedule annexed to the deed of mortgage to the plaintiff for Rs. 8,000 then advanced, and power was given to the plaintiff to sell the same in default of payment. In March, 1899, Vishram Meghji became insolvent, and his estate thereupon vested in the Official Assignee. The plaintiff claimed the mortgaged property, but the Official Assignee contended that under section 23 of the Indian Insolvency Act (Stat. 11 and 12 Vict., c. 21) he was entitled to it as property which with the consent of the true owner was in the possession, order, or disposition of the insolvent at the date of insolvency. The property was sold by consent and plaintiff brought this suit to recover the proceeds. From the evidence it appeared that the greater portion of the mortgaged property consisted of articles fixed to various parts of the flour mill or of the machinery therein.

*Held*, as to the articles not so fixed, that the plaintiff was not the true owner of these and that they were not therefore within the section and passed to the Official Assignee.

2. As to the fixed articles that they were not goods and chattels in the possession, order, or disposition of the insolvent as the reputed owner and that they were not in his reputed ownership within the section. The plaintiff was therefore entitled to them or to such portion of the proceeds of sale as represented their value.

It was contended that the fixed articles must either be goods and chattels or immoveable property, and if the latter, they could not be affected by the mortgage deed, as it was not registered, and the charge in favour of the plaintiff was therefore invalid.

*Held*, that the question of registration depended on the Registration Act (III of 1877), which requires the registration of all assurances of immoveable property. The fixed articles in question did not fall within the definition of immoveable property contained in section 3 of the Act, not being "attached to the earth or permanently fastened to any thing which is attached to the earth." Section 17 of the Registration Act therefore did not apply.

Fixtures are not goods and chattels within the rules of reputed ownership laid down in section 23 of the Indian Insolvency Act (Stat. 11 and 12 Vict., c. 21).

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The fact of such fixtures being removeable by a tenant makes no difference. They are still fixtures to which the doctrine does not apply.
MACLEOD *v.* KIKABHOY ... ... ... (1901) 25 Bom. 659

JOINT DEBTORS—*Suit against several joint debtors—Judgment against one joint debtor who admits claim does not bar suit against others—Contract Act (IX of 1872), Sec.* 43—*Partners—Practice—Procedure—Civil Procedure Code (XIV of 1882), Sec.* 153.
*See* CIVIL PROCEDURE CODE ... ... ... ... 378

JOINT FAMILY—*Adverse possession—Adverse possession of a co-sharer as against another co-sharer—Burden of proof—Limitation.*] The land in question in this suit had formerly been the joint property of three brothers, Kalian, Dullabh and Vallabh. In 1884 Kalian and Vallabh removed to a village elsewhere, and Dullabh was left in exclusive possession of the land which he cultivated until his death in 1894, when his daughter, the first defendant, entered into possession. In 1888, however, Kalian and Vallabh had sold the land to one Nagar, who in 1895 sold it to the plaintiff. In 1897 the plaintiff brought this suit for possession. The first Court passed a decree in his favour, but on appeal the Judge reversed the decree, holding that the defendant and her father Dullabh had had adverse possession for more than twelve years and that the suit was therefore barred.

On second appeal,

*Held*, by the High Court, that adverse possession had not been proved. The burden of proving adverse possession should have been placed on the defendant. Possession to be adverse must be shown to be continuous, public and adequate to the circumstances of the case.

As between brothers, especially when no partition is proved, the adverse possession of one should be proved by more satisfactory evidence than was given in this case.
JAGJIVANDAS *v.* BAI AMBA ... ... ... (1900) 25 Bom. 362

———*Self-acquisition—Partition—Burden of proof—Findings of fact—Findings based upon presumptions only—Second appeal—Practice—Hindu law.*
*See* HINDU LAW ... ... ... ... ... 367

JURISDICTION—*Defendants non-resident foreigners—Cause of action arising within jurisdiction—Civil Procedure Code (Act XIV of* 1882), *Sec.* 17, *Expl. III—Letters Patent, cl.* 12—*Small Cause Courts Act (IX of* 1887), *Sec.* 18.] Under the Civil Procedure Code (Act XIV of 1882) British Courts are empowered to pass judgment against a non-resident foreigner provided that the cause of action has arisen within the jurisdiction of the Court pronouncing the judgment.
RAMBHAT *v.* SHANKAR ... ... ... (1901) 25 Bom. 528

———*Guardian—Minor—Guardian appointed of property of a minor who was a member of a joint Hindu family and the property was joint property—Sanction given for sale of family property in which minor had a share—Jurisdiction of High Court.*] Under its general jurisdiction and apart from the Guardian and Wards Act (VIII of 1890), the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property.

The applicant in this case who sought to be appointed guardian also sought the sanction of the Court for a sale of the family property in which the minor was interested.

*Held*, under the special circumstances of the case, that the sanction should be given.
RE MANILAL HURGOVAN ... ... ... (1900) 25 Bom. 353

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JURISDICTION—*High seas—Offence committed on the high seas—Procedure—Penal Code (Act XLV of* 1860),—*37 and* 38 *Vict., c.* 27, *Sec.* 3.] A Presidency Magistrate has authority to charge, convict, and sentence under the Indian Penal Code (Act XLV of 1860) a person who has committed an offence in a British ship during her voyage on the high seas. The law applicable both as regards procedure and punishment is the Indian law.

KING *v.* THE CHIEF OFFICER OF S. S. "MUSHTARI" ... (1901) 25 Bom. 636

———*Letters Patent*, 1865, *Cl.* 12—*Dwell—Temporary residence when sufficient to give juridiction.*] The defendant, who was Political Agent at Kolhápur, left Kolhápur on the 6th March 1900, *en route* for England on a year's furlough. He arrived in Bombay on the 7th March and sailed for England on the 10th. While the defendant was in Bombay (*viz.* on the 8th March) the plaintiff presented a plaint against him, in the heading of which he (defendant) was stated to be then residing at Malabár Hill in Bombay. The plaint in the first instance was rejected for want of jurisdiction. On appeal,

*Held*, that the temporary residence of the defendant in Bombay under the circumstances gave the Court jurisdiction, and that the plaint should be admitted.

For the purposes of jurisdiction a man may be said *primâ facie* to dwell where he is staying at any particular time, but it is open to him to show that he is not dwelling there, but at some other place. The defendant had no residence at Kolhápur at the time the plaint was presented, and must be taken to have then been dwelling in Bombay.

FERNANDEZ *v.* WRAY ... ... ... (1900) 25 Bom. 176

———*Scheduled Districts—Reference and appeal in a criminal case from the Scheduled Districts,—Act No. XI of* 1846—*Scheduled Districts Act XIV of* 1874.] The Collector of Khándesh, in his capacity of Political Agent for the Mehwási Estates, convicted the accused of murder committed at a village in the Scheduled Districts, and sentenced him to transportation for life. He then forwarded the proceedings to Government for confirmation. The accused also appealed to Government against the conviction and sentence. The Government thereupon directed the Political Agent to submit the proceedings to the High Court under Rule 35 of the Rules promulgated in 1855 under section 3 of Act XI of 1846. The appeal presented by the accused was also forwarded to the High Court. The question arose as to whether the High Court had jurisdiction to dispose of the reference, the appeal being rejected as not allowed.

*Held*, that the High Court had jurisdiction.

IMPERATRIX *v.* RATNYA ... ... ... (1897) 25 Bom. 667

———*Small Cause Courts Act (IX of* 1887), *Sch.* II, *Cl.* 31—*Mesne profits, suit for—Nature of suit—Appeal.*] The plaintiff purchased certain land in June, 1892, at a sale in execution of a decree against R. He did not obtain formal possession until June, 1894. The defendant was in actual possession of the land under an alleged private sale by R. to him in October, 1892. The plaintiff now sued the defendant for mesne profits for three years, *viz.* from 1894 to 1896, alleging that they had been wrongfully received by the defendant.

*Held*, that the suit fell within the exception of clause 31 of Schedule II of the Provincial Small Cause Courts Act (IX of 1887) and was not of a nature cognizable by Courts of Small Causes, and that, therefore, an appeal lay to the District Court from the Court of the Subordinate Judge.

ANTONE *v.* MAHADEV ... ... ... (1900) 25 Bom. 85

———*Small Cause Suit—Subordinate Judge invested with Small Cause jurisdiction—Small Cause suit tried by a Subordinate Judge under his ordinary jurisdiction—Appeal.*] Where a Subordinate Judge invested with Small Cause jurisdiction tried a small cause suit under his ordinary jurisdiction,

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*Held*, that the character of the suit was not altered by the mode in which the Subordinate Judge had exercised his jurisdiction and that his decree being final, was not appealable to the District Court.

SHANKARBHAI *v.* SOMABHAI ... ... ... (1900) 25 Bom. 417

JURISDICTION—*Vatan—Bombay Act III of* 1874, *Sec.* 18—*Suit for a declaration of right to a share in a vatan, and to participate in the emoluments of the vatan—Jurisdiction of the Civil Court to entertain such suit.*] Where the plaintiffs sued to obtain a declaration that they were entitled to a third share in a Maharki vatan and to participate in the profits of the vatan,

*Held*, that under section 18 of Bombay Act III of 1874 the Civil Court had no jurisdiction to make the declaration sought.

*Parsha* v. *Lagmya* (1888) 13 Bom. 83) followed.

BHIVA *v.* VITHYA ... ... ... (1900) 25 Bom. 186

JURY—*Offence triable with the aid of assessors tried in fact by a jury—Trial by jury—Appeal on a matter of fact—Practice—Procedure—Criminal Procedure Code* (*V of* 1898), *Secs.* 269 *and* 418.

*See* CRIMINAL PROCEDURE CODE ... ... ... ... 680

LAND—*Suit for—Question of title—Provincial Small Cause Court Act* (*IX of* 1887), *Sec.* 23—*Claim to possession of land when title to land disputed—Small Cause Court.*

*See* SMALL CAUSE COURT ... ... ... ... ... 625

LAND REVENUE—*Land Revenue in Bombay—Assessment—Enhancement of assessment—Bombay Act II of* 1876—*Purchase of land from Government—Encroachment—Acquisition of land under Sec.* 26 *of Bombay Act II of* 1876—*Vendor and purchaser—Estoppel.*] The plaintiff was the owner of certain land in Bombay consisting of three separate plots which had been bought from Government at different times. Plot No. 1 had been bought by the plaintiff's father in 1880, to whom the Collector of Bombay, with the sanction of Government, had sold it at "the rate of Re. 1 a square yard and ground rent at 30 pies per *burga* of 60 square yards per annum." Plot No. 2 was acquired by encroachment, and was sold in 1884 to the plaintiff's father by the Collector under clause 2 of section 26 of Bombay Act II of 1876, five times the value of the land being paid and assessment being charged as provided by that section. Plot No. 3 was bought in 1885 for the sum of Rs. 208-14 3, the rate of valuation being stated as "Re. 1 per square yard and rent at 30 pies per *burga* of 60 square yards."

Assessment was duly paid at the rates originally agreed until 1899. In August of that year the Collector served the plaintiff with a notice enhancing the assessment to three annas per square yard per annum. The plaintiff thereupon filed this suit under section 14 of Bombay Act II of 1876. The Revenue Judge dismissed the suit with costs. On appeal,

*Held*, reversing the decree that the Government had no right to enhance the assessment. The sale of plot No. 1 was expressly stated to be at a ground rent of 30 pies per *burga*, and this established a specific limit to the assessment. Plot No. 2 was sold by the Collector under section 26 of Bombay Act II of 1876, and the Collector having charged the maximum price and imposed the maximum assessment without reserving to himself any right could not now enhance the assessment. As to plot No. 3, the reasonable inference from the known facts was that the limit was fixed as in the case of plot No. 1.

JETHABHOY RUTTONSEY *v.* COLLECTOR OF BOMBAY ... (1901) 25 Bom. 752

———*Land Revenue in Bombay—Assessment—Enhancement of assessment—Bombay Act II of* 1876—*Sale of land by Government to a purchaser assessed at a certain rate—Subsequent enhancement—Vendor and purchaser—Estoppel—Evidence Act* (*I of* 1872), *Sec.* 115.] Certain lands in Bombay consisting

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of three separate plots were held by the Trustees of the Free Church of Scotland Mission under a grant from Government (no deed, however, being executed) for the purposes of a school for native girls. No assessment was paid for a part of the land and a merely nominal assessment was paid for the rest. Being desirous of transferring the school to another locality, the Trustees obtained the consent of Government to sell the land, and in order to put the Trustees in a position to sell, certain indentures were executed to the Trustees. Plot 1 was conveyed by Government to them, "their heirs and assigns for ever" subject to a right of resumption, but without any mention of assessment. Plots 2 and 3 were conveyed by Government to them, "their heirs, executors, administrators and assigns for ever," but in this case the conveyance was "subject to the payment of all taxes, rates, charges and assessments leviable or chargeable in respect of the premises or anything for the time being thereon."

On the 25th August, 1886, one Janardhan Gopal offered to buy the whole piece of land for Rs. 32,500, on condition (*inter alia*) that the whole property should be conveyed to him "as freehold tenure or for a nominal Government tax." The Trustees desired to accept this offer, and communications took place between them and Government with reference to it. On the 21st June, 1887, they wrote to Government stating that it was most desirable that the offer should be accepted, but that the purchaser required that the amount of assessment on the land should not exceed what was payable in respect of pension and tax tenure in the same locality, and they requested the Government to ask the Collector of Land Revenue to say "what the land would be assessed at for the purposes of the land revenue, it being assumed that the land was of the pension and tax tenure." On the 11th July, 1887, the Government passed a Resolution in reference to this request as follows: "The land in question will be liable in the purchaser Mr. Janardhan Gopal's hands to be assessed under the rules ordinarily applicable to land of the same description. The Collector should be desired, on the application of either the Secretary of the Free Church Mission or of the purchaser, Mr. Janardhan Gopal, to state what the assessment of the land revenue will be and what are the rules affecting the amount of the assessment."

Acting on this Resolution Messrs. Ardesir Hormasji & Co. as attorneys both for the Trustees and the purchaser wrote to the Collector on the 14th July, 1887, setting forth the above Resolution, and requesting him to furnish the desired information. On the 25th July, 1887, the Collector replied: "I have the honour to inform you that the land will be assessed at the rate of nine pies per square yard per annum. This is the rate of assessment which is charged for Government land in this locality* * *. * which has been followed for the last six years."

With a view to facilitate the sale by the Trustees to Janardhan Gopal, the Government on the 20th December, 1887, granted all the reversion and estate in the three plots of land to the Trustees, their heirs, administrators and assigns for ever, but subject to the payment of taxes, rates, charges, assessments leviable or chargeable in respect of the premises or anything for the time being thereon. The deed recited that the Trustees, with the approval of Government, had resolved to sell the said land and that they had agreed with the said Janardhan Gopal for the absolute sale of the same to him.

On the 16th January, 1888, the land was conveyed to Janardhan Gopal, the purchaser. The parties to the deed were the Trustees of the Mission, the Secretary of State, and the said Janardhan Gopal, and it recited that the Trustees had agreed for the absolute sale of the land to Janardhan Gopal, and with the consent of Government it conveyed the same to him, "his heirs, executors, administrators and assigns for ever, subject to the payment of all rates, taxes, charges, assessments leviable or chargeable in respect of the premises." And the Secretary of State for himself and his successors released and discharged the said Janardhan Gopal, his heirs, executors, administrators and assigns from all manner of rights, powers, authorities and privileges reserved in respect of the premises, &c., &c.

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In 1893 the property became vested under a partition in the plaintiff, who was Janardhan Gopal's son. Until 1899 the assessment of nine pies per square yard was paid, but in August, 1899, the plaintiff received from the Collector a notice under section 8 of Bombay Act II of 1876 that the assessment was enhanced to six annas and six pies per square yard per annum. The plaintiff thereupon filed this suit in the Court of the Revenue Judge under section 14 of Bombay Act II of 1876, contesting the legality of the enhancement. The Revenue Judge dismissed the suit. On appeal to the High Court,

*Held*, reversing the decree and setting aside the order of enhancement, that the plaintiff had a right to hold the land for ever on payment of assessment at the rate of nine pies per square yard per annum; and that the Government had no right to enhance the said rate. Janardhan Gopal had purchased the property out-and-out for its full value. To such a purchaser the right to enhance the assessment should in all fairness have been clearly disclosed. The meaning that a reasonable man would under the circumstances ascribe to the Collector's letter of the 25th July, 1887, was that a specific limit of nine pies per square yard per annum was established under section 8 of Bombay Act II of 1876. That being so, the Government and the Collector were bound. The conduct of Government, coupled with the statement of Government made on their behalf for the purposes of the purchase was, under the circumstances, such as to create and encourage in the purchaser as a reasonable man the belief that he was purchasing property substantially worth Rs. 33,000, and that Government were not silently reserving to themselves an unfettered right to destroy the value of that property and practically to confiscate that which had been sold.

DADOBA JANARDHAN *v.* COLLECTOR OF BOMBAY ... (1901) 25 BOM. 711

LAND REVENUE—*Limitation Act* (*XV of* 1877), *Sch. II, Arts.* 110 *and* 120—*Assessment—Land Revenue—Suit for arrears of assessment.*

*See* ASSESSMENT ... ... ... ... ... ... 556

———*Suit for land revenue not a suit for rent—Dekkhan Agriculturists' Relief Act* (*XVII of* 1879), *Sec.* 3, *Cl.* (*x*).

*See* DEKKHAN AGRICULTURISTS' RELIEF ACT ... ... ... 244

———CODE (BOMBAY ACT V OF 1879), SECS. 4, 13, 15, 18, 19 AND 20—*Mámlatdár's Courts Act* (*Bombay Act III of* 1876), *Sec.* 3—*Mámlatdár—Substitute designated under the Land Revenue Code—Exercise of the powers of Mámlatdár.*] A substitute designated under section 15 of the Land Revenue Code (Bombay Act V of 1879) cannot exercise the powers conferred by the Mámlatdárs' Courts Act (Bombay Act III of 1876) on the Mámlatdár to whose office he has temporarily succeeded.

DEORAV *v.* NARAYANDAS ... ... ... (1900) 25 Bom. 318

———SECS. 119, 120 AND 121—*Boundary dispute—Settlement of such dispute by Collector—Civil Court's jurisdiction—Jurisdiction.*] Section 121 of the Land Revenue Code (Bombay Act V of 1879) must be read along with sections 119 and 120 of the Code.

It is only when a boundary dispute arises between the owners of adjoining lands, and the Collector is called upon to determine the dispute, that his determination becomes final under section 121 of the Code so as to oust the jurisdiction of the Civil Court.

LAKSHMAN *v.* ANTAJI ... ... ... (1900) 25 Bom. 312

LANDLORD AND TENANT—*lease—condition—condition binding tenant to reclaim land—Meaning of the word "reclaim"—construction.*] On the 16th June, 1885, certain marshy land adjoining the sea comprising about 760 acres was leased by Government to the plaintiff in perpetuity, subject to the condition (*inter alia*) that if the whole of it was not reclaimed (*navasádhya*) by the end of ten years, the lease might be cancelled. At the end of the ten years only 83 acres of the land were actually under cultivation. The remainder had been rendered safe against

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the inroad of salt water. In March 1896, the Government cancelled the lease on the ground that the plaintiff had not brought the whole of the land into cultivation. The plaintiff thereupon instituted this suit, praying for a declaration that the Government had no right to cancel the lease, and for an injunction restraining it from taking possession of the land. He contended that under the condition he was only bound to reclaim the land from the sea and that he had done so; that he was not bound to render the land fit for cultivation, but that, if he was, he had done so as far as it was possible.

*Held*, awarding the plaintiff's claim, that on the construction of the lease the term "reclaim" (*navasádhya*) as used in the grant meant nothing more than recovering the land from the dominion of the sea, and did not include the further obligation of rendering the land fit for cultivation. The plaintiff having erected the necessary embankments to shut out the sea was entitled to say that he had reclaimed the land and satisfied the terms of the grant.

SHAMRAO PANDURANG *v.* SECRETARY OF STATE FOR INDIA... (1900) 25 Bom. 32

LANDLORD AND TENANT—*lease—Ouster of tenant by paramount owner—Claim by tenant against his lessor for compensation for such ouster—Covenant for quiet enjoyment—Damages—Measure of damages—Transfer of Property Act* (IV *of* 1882), *Sec.* 108, Cl. (*c*).] The words "without interruption" in section 108, clause (*c*), of the Transfer of Property Act (IV of 1882) give a lessee in India the same rights as he would have under what is known in England as a covenant for quiet enjoyment in an unqualified form. In other words, the lessee is protected against interruption by whomsoever it is occasioned.

Where the interruption is caused by the paramount owner of the property, and not by a stranger, the lessor is bound to remove the interruption, and if he fails to do so, he must indemnify the lessee.

A held land under a lease granted by B for eleven years. B had no title to the land, which really belonged to C. In 1895 C dispossessed A.

*Held*, that under clause (*c*) of section 108 of the Transfer of Property Act (IV) of 1882) A was entitled to recover compensation from B.

TAYAWA *v.* GURSHIDAPPA ... ... ... (1900) 25 Bom. 269

———*Suit for arrears of assessment—Limitation Act* (*XV of* 1877), *Sch. II, Arts.* 110 *and* 120—*Assessment—Land Revenue.*

*See* LAND REVENUE ... ... ... ... ... 556

LEASE—*Condition—Condition binding on tenant to reclaim land—Meaning of the word "reclaim"—Construction—Landlord and tenant.*

*See* LANDLORD AND TENANT ... ... ... ... 32

———*Ouster of tenant by paramount owner—Claim by tenant against his lessor for compensation for such ouster—Covenant for quiet enjoyment—Damages—Measure of damages—Transfer of Property Act* (*IV of* 1882), *Sec.* 108, *Cl.* (*c*)—*Landlord and tenant.*

*See* LANDLORD AND TENANT ... ... ... ...269

LETTER OF CREDIT—*Bill of exchange—Meaning of the word "honoured" in reference to a bill of exchange—Right of acceptor of bill to shipping documents.*] It is in accordance with ordinary mercantile usage for a party presenting a bill for acceptance to deliver to the acceptor at the time of acceptance the shipping documents relating to the goods in respect of which the bill is drawn.

The primary purpose of a letter of credit is to secure an obligation to accept the bills or drafts drawn under it. An acceptance of itself imposes an obligation to pay.

Where a letter of credit stipulates for security, the purpose is to obtain that security at acceptance, for it is then that the acceptor's liability on the draft arises.

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A letter of credit addressed by the firm of S. R. & Co. to the defendant stated that his drafts to the extent of £4,000 would be "duly honoured by us against delivery of shipping documents and invoices." A bill was drawn by the defendant upon the firm against this credit and was sold and handed over by him to the Bank, together with shipping documents relating to a consignment of goods made by him in respect of which the bill was drawn. The Bank presented the bill to S. R. & Co., by whom it was duly accepted, and the Bank thereupon handed over the shipping documents to S. R. & Co. When the bill became due, the acceptors (S. R. & Co.) did not pay, and the Bank then sued the defendant (the drawer). The defendant contended that in the letter of credit the word "honoured" meant "paid," and that the Bank should not have handed over the shipping documents to S. R. & Co. until the bill was paid.

*Held*, that it was in accordance with ordinary mercantile usage to hand over the shipping documents to the acceptor at the time of acceptance, and that there was nothing in the letter of credit to prevent the Bank from acting in accordance with that usage. The word "honoured" in the letter of credit meant "honoured by acceptance."

*Ex parte Agra and Masterman's Bank* (1867) L. R. 2 Ch. 396 referred to.

NATIONAL BANK OF INDIA *v.* SALEH MAHOMED ... (1901) 25 Bom. 706

LETTERS PATENT, 1865, Cl. 12—*Dwell—Temporary residence when sufficient to give Jurisdiction—Jurisdiction.*

*See* JURISDICTION ... ... ... ... ... 176

LIFE INSURANCE—*Policy of—Indian Stamp Act (II of 1899), Sch. I, Art. 47 (d)—Certificate of membership.*] The certificate of membership of a Provident Society was to the following effect:—

"You have on condition of your conforming to the rules and regulations of this society from time to time in force, insured your life in the class of the society at the age of

"The name of Mr. , residing at , has been registered as that of the person to whom the amount due under the rules of this society after your death should be paid."

*Held*, that the above certificate was a policy of life insurance within the meaning of article 47 (*d*) of Act II of 1899, and as such liable to pay *ad valorem* duty.

*In re* HIMAT PROVIDENT SOCIETY ... ... (1900) 25 Bom. 376

LIMITATION—*Document—Alteration of a document—Material alteration—Material alteration in a written acknowledgment of a debt does not render it inoperative and ineffective—Limitation*

*See* DOCUMENT ... ... ... ... ... 616

———*Executor—Suit by legatee against executor for arrears of rent—Will—Construction.*

*See* WILL ... ... ... ... ... ... 429

———*Limitation Act (XV of 1877), Sch. II, Art. 2—Municipal Act, Bombay City (Bom. Act III of 1888), Sec. 527—Notice of suit when necessary—Refund of town duties.*

*See* MUNICIPALITY ... ... ... ... ... 387

———*Limitation Act (XV of 1877), Sch. II, Art. 144—Symbolical possession—Effect of symbolical possession as between judgment-creditor or his assigns and judgment-debtor or his heirs—Suit by purchaser from judgment-creditor to recover possession from heir of judgment-debtor.*] As between the judgment-creditor or his assigns on one side, and the judgment-debtor or his heirs on the

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other, symbolical possession is as good as actual possession to give the (judgment-creditor's) purchaser or his assigns the right to bring a suit for possession within twelve years from the date of such symbolical possession.

MAHADEO *v.* PARASHRAM ... ... ... ... (1900) 25 Bom. 358

LIMITATION ACT (XV OF 1877), SEC. 5—*Practice—Appeal—Joint appellants—Presentation of appeal beyond time—Affidavit excusing delay in appealing made by only one of appellants stating reasons personal to himself—Appeal admitted—Variation of decree on a point affecting other appellants but not the appellant who made the affidavit—Variation not allowed—Civil Procedure Code (XIV of 1882), Sec. 544.*] In a partition suit a decree was passed against twenty-four defendants whose interests in the subject-matter of the suit were not identical. Part of the property in suit consisted of a kulkarni vatan, one-third share of which (*inter alia*) was given by the decree to the plaintiffs. Eleven of the defendants appealed against the decree, of whom only six (defendants 1 to 6) had an interest in the kulkarni vatan. The decree was passed on the 11th April, 1898, and the appeal was not presented until the 7th June, 1898, *i.e.* beyond the period (thirty days) allowed by the Limitation Act (XV of 1877). The only affidavit excusing the delay was made by defendant 14, who was not interested in the kulkarni vatan, and it stated reasons for the delay which were personal to himself, and did not apply to the other appellants. On this affidavit, however, the appeal was admitted, and the lower appellate Court modified the decree and reduced the one-third share of the kulkarni vatan given to the plaintiffs to a one-sixth share. The plaintiffs thereupon appealed to the High Court.

*Held*, (reversing the decree of the lower appellate Court and restoring that of the first Court) that the appellate Court erred in altering the share of the kulkarni vatan. Defendant 14 had no interest in the variation of the decree, having no interest in the kulkarni vatan, and section 544 of the Civil Procedure Code (XIV of 1882) did not apply. The variation was only in favour of defendants 1 to 6, who alone were interested in the vatans. They, however, had not excused their delay in presenting the appeal and it was barred by limitation.

VISHWANATH *v.* VASUDEV ... ... ... (1901) 25 Bom. 699

———SECS. 5 AND 12—*Appeal—Exclusion of time for obtaining copies of judgment and decree appealed against.*] An application for a copy of the decree may be made by an intending appellant at any time within the prescribed period of limitation; and he is then entitled under section 12 (in computing the period of limitation) to exclude the time requisite for obtaining such copy.

By section 5, in case the period of limitation prescribed for an appeal expires on a day when the Court is closed, the appeal may be presented on the day the Court re-opens. An application for a copy of the decree may be made on that day, and if so made, the time for obtaining such copy is excluded under section 12.

So long as the right to present an appeal subsists, the exclusion sanctioned by section 12 of the Limitation Act (XV of 1877) applies.

*Siyadat-un-Nissa* v. *Muhammed Mahomed* ((1897) 19 All. 342) followed.

PANDHARINATH *v.* SHANKAR ... ... ... (1901) 25 Bom. 586

———SECS. 5 AND 12—*Appeal—Subsisting right of appeal—Application for copies—Exclusion of time in computing the period of limitation.*] So long as the right of appeal is subsisting, an appellant is entitled under section 12 of the Limitation Act (XIV of 1877) to apply for a copy of the lower Court's decree. The time requisite for obtaining such copy should be excluded in computing the period of limitation prescribed for the appeal.

*Siyadat-un-Nissa* v. *Muhammed* ((1897) 19 All. 342) and *Sitaram* v. *Ramji* ((1900) P. J. p. 53) followed.

TUKARAM *v.* PANDURANG ... ... ... (1901) 25 Bom. 584

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LIMITATION ACT (XV OF 1877), SEC. 19, EXPL. I—*Acknowledgment—Accounts.*] Under sec. 19, explanation I, of the Limitation Act (XV of 1877), it is open to the plaintiff by reference to the accounts or otherwise to establish a connection between two accounts (khátas), and show that the latter one was an acknowledgment of the debt due under the first.

KALIANDAS *v.* LOTU ... ... ... (1900) 25 Bom. 330

———————SEC. 23, SCH. II, ART. 35—*Husband and wife—Pársis—Suit for restitution of conjugal rights—Limitation—Pársi Marriage and Divorce Act (XV of 1865).*] A suit under the Pársi Marriage and Divorce Act (XV of 1865) by a wife for the restitution of her conjugal rights is barred by the lapse of time when restitution has been demanded by her and refused by the husband being of full age and sound mind more than two years prior to the commencement of the suit.

DHANJIBHOY *v.* HIRABAI ... ... ... (1901) 25 Bom. 644

———————SCH. II, ART. 12—*Civil Procedure Code (Act X of 1877), Secs. 234, 248, 311—Execution—Decree—Death of judgment-debtor after decree but before execution—Sale in execution without notice to legal representatives—Notice given to wrong person—Title of purchaser at such sale—Sale irregular but not a nullity—Suit to set aside such sale must be brought within one year.*

*See* CIVIL PROCEDURE CODE ... ... ... ... 337

———————SCH. II, ART. 47—*Possessory suit—Mámlatdár's Court—Mámlatdár's Courts Act (Bom. Act III of 1876), Sec. 13.*] In a possessory suit instituted in a Mámlatdár's Court neither the plaintiff nor the defendant appeared at the hearing. The case was, therefore, disposed of by the Mámlatdár under the first part of section 13 of the Mámlatdárs' Courts Act (Bom. Act III of 1876).

*Held*, that the order of the Mámlatdár was an order rejecting the plaint.

A regular suit for possession having been brought in a Civil Court more than three years after the above order of the Mámlatdár,

*Held*, that the suit was time-barred under article 47, schedule II, of the Limitation Act (XV of 1877).

PURUSHOTTAM *v.* CHATARGIR ... ... (1900) 25 Bom. 82

———————SCH. II, ARTS. 62 AND 97—*Contract—Failure of consideration—Vendor and purchaser—No title in vendor to part of land sold—Failure to give possession to vendee—Suit by vendee for refund of purchase-money—Compensation—Damages—Limitation.*] On the 25th August, 1891, A sold certain property consisting of forty-two separate plots of land to the plaintiff by a sale-deed, which contained the usual covenant for quiet enjoyment. The plaintiff obtained possession of thirty-six of the plots, but not of the remaining six. The occupants of these latter had been in possession for many years and claimed to be owners of them. On 6th September, 1897, the plaintiff brought this suit for possession against A (his vendor) and the occupant of one of the six plots, and in the alternative he claimed compensation from A. Both the lower Courts found that A's title to the plot in question had been extinguished at the date of the conveyance to the plaintiff in 1891 and they held that the plaintiff's claim for compensation was barred by limitation under Article 62 of Schedule II of the Limitation Act (XV of 1877). On second appeal it was contended that the plaintiff's right to compensation arose only when the lower Court decided that he could not obtain possession of the land and that consequently his claim fell within Article 97 of the Limitation Act, and was not barred. *Held*, (Whitworth, J., dissenting) that Article 62 applied and that the plaintiff's claim for compensation was therefore barred. As A (the plaintiff's vendor) had no title to the land at the date of conveyance, the contract of sale was void *ab initio*: there was then a failure of consideration and the plaintiff's cause of action for compensation arose on that date.

ARDESIR *v.* VAJESING ... ... ... (1901) 25 Bom. 593

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LIMITATION ACT (XV OF 1877), SCH. II, ART 91—*Suit to cancel a document—Cause of action.*] Where a plaintiff sought for the cancellation of mortgage-bond and for possession of the mortgaged property, alleging that the mortgage was a sham transaction and that she, the plaintiff, had subsequently remained in possession and had only been dispossessed within three years before suit,

*Held*, that if the plaintiff's allegations to remaining as in possession were true, the period of limitation for the suit could not be computed from the date of the mortgage-bond as provided in article 91 of the Limitation Act (XV of 1877).

*Janki Kunwar* v. *Ajit Singh* ((1887) 15 Cal., 58) distinguished.

VITHAI *v.* HARI ... ... ... (1900) 25 Bom. 78

——————————SCH. II, ARTS. 110 AND 120—*Land Revenue—Assessment—Suit for arrears of assessment.*] The term "rent" is used in the Code only with reference to those superior and inferior holders between whom the relationship of landlord and tenant subsists.

Plaintiff was the *Inámdár* of a certain village. Defendant held certain lands in the said village, but he was not placed in possession thereof either by the plaintiff or his predecessor in title under any agreement. Plaintiff sued to recover from the defendant five years' arrears of assessment. Defendant contended that plaintiff was not entitled to claim arrears for more than three years.

*Held*, that the suit was governed by article 120 and not 110 of the Limitation Act (XV of 1877), the relationship between the parties being that of superior and inferior holder and not that of landlord and tenant.

SADASHIV *v.* RAMKRISHNA ... ... (1901) 25 Bom. 556

——————————ARTS. 118 AND 141—*Adoption—Reversioner—Limitation—Suit by a reversioner for possession of immoveable property.*] A suit by a Hindu reversioner to recover possession of immoveable property after the death of a childless widow is barred by article 118 of the Limitation Act (XV of 1877) if the claim to such possession cannot be established without setting aside the defendant's adoption of which the plaintiff had become aware more than six years before suit.

Raiji Khoda, a Hindu, died in 1869, leaving behind him a childless widow. In 1884 plaintiffs applied for a certificate of heirship to the deceased's estate under Regulation VIII of 1827. The widow opposed the application, alleging that the deceased had adopted a son (defendant No. 1) in 1863-64. The certificate was refused, and both parties were referred to a suit for the purpose of determining the question of the alleged adoption. But neither party filed a suit as directed.

In 1897 the widow died and thereupon plaintiffs as reversionary heirs sued to recover possession of the deceased Raiji's property.

The defendant pleaded that he was the adopted son of Raiji, and that the suit was barred by limitation.

Both the lower Courts held that the adoption was not proved, and that the suit was not time-barred.

*Held*, on second appeal, that though the defendant's adoption was not proved, yet as he had all along asserted his adoption to the knowledge of the plaintiffs since 1884, plaintiffs' suit was barred by article 118 of the Limitation Act (XV of 1877).

BAROT NARAN *v.* BAROT JESANG ... ... (1900) 25 Bom. 26

——————————SCH. II, ARTS. 136 TO 138 AND 144—*Symbolical possession—Auction-purchaser—Suit for possession from judgment-debtor—Limitation.*] Where an auction-purchaser at a Court-sale has obtained symbolical possession, he or his assigns may sue the judgment-debtor for actual possession within twelve years from the date of obtaining such symbolical possession. Article 144 of the Limitation Act (XV of 1877) applies.

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Articles 136, 137 and 138 of schedule II of the Limitation Act (XV of 1877) refers to cases where no possession, formal or actual, has been obtained through the Court.

Article 136 applies to a private purchaser from a person not in possession.

Article 137 applies to an auction-purchaser of the rights of a person not in possession.

Article 138 applies when the actual purchase is made of the rights of a judgment-debtor, who is in possession at the date of the sale.

When an auction-purchaser or his assign has obtained formal possession, but is disturbed by the judgment-debtor or his heirs who have continued in actual possession, article 144 applies.

GOPÁL *v.* KRISHNARÁO ... ... ... (1900) 25 Bom. 275

LIMITATION ACT (XV OF 1877), SCH. II, ART 179 (4)—*Execution—Payment of bhatta—No fresh starting point.*] An application for execution of a decree was made and granted on the 4th November 1897. The *bhatta* (process-fee), however, was not paid to the Názir until afterwards, namely,—on the 8th November 1897. There was no written application in connection with this payment, nor did it appear that there was any oral application at the time of payment except such as might be inferred from the fact of payment.

*Held*, that such a payment of *bhatta* did not constitute a fresh starting point from which the period of limitation prescribed by article 179 of the Limitation Act (XV of 1877) began to run.

From the mere fact of payment of *bhatta* an application such as is prescribed by that article cannot be inferred; at most it would merely be an application to receive the money, and the payment would be no more than the performance of a condition essential to the order for execution.

MALUKCHAND *v.* BECHAR NATHA ... ... (1901) 25 Bom. 639

MAINTENANCE—*Daughter-in-law—Her claim to maintenance against self-acquired property devised by her father-in-law—Hindu Law.*] The widow of a predeceased unseparated son has no right to maintenance from a person to whom her father-in-law has bequeathed the whole of his self-acquired property.

*Yamnábai* v. *Manubái* ((1899) 23 Bom. 608) referred to and distinguished.

BA'I PA'RWATI *v.* TARWADI DOLATRA'M ... ... (1900) 25 Bom. 263

MALICIOUS PROSECUTION—*Question of malice and reasonable and probable cause—Concurrent findings of lower Courts.*] In an action for malicious prosecution in which the plaintiff claimed Rs. 3,00,000 as damages, the Court of first instance dismissed the suit, holding that the plaintiff had not proved either the existence of malice or the absence of reasonable and probable cause. The plaintiff appealed and the Appeal Court dismissed the appeal on the same grounds, and on appeal to the Privy Council their Lordships also held that both as regards malice and the absence of reasonable and probable cause, the plaintiff had failed to discharge the burden of proof which lay upon him.

PESTONJI M. MODY *v.* QUEEN INSURANCE CO. ... (1900) 25 Bom. 332

M'AMLATDA'R—*Land Revenue Code (Bombay Act V of 1879), Secs. 4, 13, 15, 18, 19 and 20—Mámlatdars' Courts Act (Bombay Act III of 1876), Sec. 3—Substitute designated under the Land Revenue Code—Exercise of the powers of Mámlatdár.*] A substitute designated under section 15 of the Land Revenue Code (Bombay Act V of 1879) cannot exercise the powers conferred by the Mámlatdárs' Courts Act (Bombay Act III of 1876) on the Mámlatdár to whose office he has temporarily succeeded.

DEORA'V *v.* N'ARA'YANDA'S ... ... ... (1900) 25 Bom. 318

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MA'MLATDA'R—*Mámlatdárs' Courts Act (Bom. Act III of* 1876), *Sec.* 4—*Natural water-course—Riparian proprietors—Obstruction to the flow of water—Injunction—Jurisdiction.*] *Held* by the Full Bench (Whitworth, J., dissenting) that a Mámlatdár has, under the Mámlatdárs' Courts Act (Bom. Act III of 1876), jurisdiction to inquire into a case in which it is alleged that an upper riparian proprietor has unduly interfered with the flow of water in a natural water-course from which a lower riparian proprietor also takes water.

SOM GOPAL *v.* VINA'YAK ... ... ... (1900) 25 Bom. 395

MA'MLADA'RS' COURTS ACT (BOM. ACT III OF 1876), SEC. 13—*Limitation Act (XV of* 1877). *Sch. II, Art.* 47—*Possessory suit—Mámlatdár's Court.*] In a possessory suit instituted in a Mámlatdár's Court neither the plaintiff nor the defendant appeared at the hearing. The case was, therefore, disposed of by the Mámlatdár under the first part of section 13 of the Mámlatdárs' Court Act (Bom. Act III of 1876).

*Held*, that the order of the Mámlatdár was an order rejecting the plaint.

A regular suit for possession having been brought in a Civil Court more than three years after the above order of the Mámlatdár,

*Held*, that the suit was time-barred under article 47, schedule II of the Limitation Act (XV of 1877.)

PURUSHOTTAM *v.* CHATARGIE ... ... ... (1900) 25 Bom. 82

MESNE PROFITS—*Redemption suit—Decree in such suit making no order as to mesne profits—Subsequent suit by plaintiff for surplus mesne profits accrued due prior to former suit—Res judicata—Civil Procedure Code (Act XIV of* 1882), *Sec.* 13, *Explanations II and III.*

*See RES JUDICATA* ... ... ... ... ... 115

———————SUIT FOR—*Nature of suit—Jurisdiction—Appeal—Provincial Small Cause Courts Act (IX of* 1887), *Sch. II, Cl.* 31.] The plaintiff purchased certain land in June 1892, at a sale in execution of a decree against R. He did not obtain formal possession until June 1894. The defendant was in actual possession of the land under an alleged private sale by R. to him in October 1892. The plaintiff now sued the defendant for mesne profits for three years, *viz.*, from 1894 to 1896, alleging that they had been wrongfully received by the defendant.

*Held*, that the suit fell within the exception of clause 31 of schedule II of the Provincial Small Cause Courts Act (IX of 1887) and was not of a nature cognizable by Courts of Small Causes, and that, therefore, an appeal lay to the District Court from the Court of the Subordinate Judge.

ANTONE *v.* MAHA'DEV ... ... ... (1900) 25 Bom. 85

MINOR—*Guardian appointed of, property of a minor, who was a member of a joint Hindu family and the property was joint property—Sanction given for sale of family property in which Minor had a share—Jurisdiction of High Court.*] Under its general jurisdiction and apart from the Guardian and Wards Act (VIII of 1890), the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property.

The applicant in this case who sought to be appointed guardian also sought the sanction of the Court for a sale of the family property in which the minor was interested,

*Held*, under the special circumstances of the case, that the sanction should be given.

*RE* MANILA'L HURGOVAN ... ... ... (1900) 25 Bom. 353

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MINOR—*Practice—Procedure—Succession Certificate Act (VII of 1889), sections 6, 7 and 9—Summary proceedings—Questions of disputed adoption not to be determined in such proceedings—Security—Guardian's right to certificate on behalf of the minor—Guardian and Ward.*

*See* PRACTICE ... ... ... ... ... 523

———*Suit to recover custody of—Suit by a father for the recovery of his children illegally detained—Tort—Death of defendant pending suit—Survival of cause of action against defendant's heirs—Practice—Procedure.*] A Civil Court has jurisdiction to entertain a suit by a father to recover possession to his minor children illegally detained by a stranger. Such a suit is not barred by the provisions of the Guardian and Wards Act (VIII of 1890).

A Mahomedan sought to recover possession of his minor daughters, who were alleged to have been illegally detained by the defendant Mukimbhái. Pending the suit, Mukimbhái died, and the suit was continued against his widow Sharifa as his heir and legal representative, on the ground that the minors were in her possession.

*Held*, that the cause of action did not survive as against the widow of the deceased defendant, and that, therefore, the suit could not proceed. The cause of action which gave rise to the suit was extinguished when the defendant Mukimbhái died.

SHARIFA *v.* MUNEKHA'N... ... ... ... (1901) 25 Bom. 574

MORTGAGE—*Amount of decree included in the mortgage—Agreement to give time—Satisfaction—Civil Procedure Code (XIV of 1882), Section 257A—Decree.*] The agreement to which the first paragraph of section 257A of the Civil Procedure Code (Act XIV of 1882) relates is one which suspends and does not destroy the rights of execution consequent on a decree.

Where a mortage-bond was given for an amount which included a sum due under a decree and made the whole amount payable in instalments, it was contended, under section 257A of the Civil Procedure Code (Act XIV of 1882), that the bond was void to the extent of the sum due under the decree, being an agreement to give time for the satisfaction of a judgment-debt, and that in respect of that sum no suit would lie,

*Held*, that the suit was maintainable. The mortgage-bond did not suspend the right to execute the decree, but it put an end to the remedy on the decree and substituted the mortgage-bond. It was the actual and present satisfaction of the judgment-debt, and therefore was not an agreement to give time for the satisfaction of a judgment-debt, and did not fall within section 257A of the Civil Procedure Code.

TUKA'RA'M *v.* ANANTBHAT ... ... ... (1900) 25 Bom. 252

———*Indian Stamp Act (II of 1899), Sch. I, Arts. 32 and 40—Further charge—Stamp.*] Certain property was mortgaged with possession for Rs. 180 by a deed of mortgage, dated 23rd May 1895. The deed was on a stamp paper of Rs. 2 (two).

On 23rd August 1899, the same property was re-mortgaged to the same mortgagee for Rs. 250, made up of Rs 180, the consideration for the former deed, and another sum of Rs. 70 due to the mortgagee. This second deed was written on a stamp paper of Re. 1.

*Held*, that the second deed was not intended to operate merely as a further charge, but as a new mortgage in which the previous one merged, and that it should therefore be stamped as a mortgage-bond with possession for Rs 250.

*IN RE* MEGHA ... ... ... ... (1900) 25 Bom. 370

———*Redemption—Decree for redemption—Failure of mortgagor to pay the sum ordered by the decree—Rights of mortgagee on such failure—Transfer of*

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*Property Act* (*IV of* 1882), *Secs.* 92 *and* 93.] In a suit by a mortgagor for redemption of a mortgage, dated 17th March 1891, a decree was passed in 1897 allowing him to redeem on payment of the mortgage-debt within a year from the date of the decree: but the decree did not contain any provision for foreclosure or sale in default of payment on the due date.

The plaintiff having made default, the defendant applied to the Court for an order absolute for foreclosure or sale, under section 93 of the Transfer of Property Act (IV of 1882). His application wa rejected on the ground that as the decree did not contain any clause for foreclosure or sale, section 93 of the Act was not applicable.

*Held*, in second appeal, that the defendant (mortgagee) was entitled to the remedy given by section 93 although the decree was not drawn up as prescribed by section 92. The omission of the Court to draw up the proper decree under section 92 did not deprive the mortgagee of the relief provided by section 93.

MURLIDHAR *v.* PARSHARA'M ... ... ... (1900) 25 Bom. 101

MUNICIPALITY—*Bombay District Municipal Act* (*Bombay Act VI of* 1873), *Secs.* 17, 48 *and* 64—*Street—Public Street—Street lighted and swept by Municipality.*] The mere circumstance that a street is lighted and swept by a Municipality is not of itself sufficient to convert a private into a public street.

ANKLESHVAR MUNICIPALITY *v.* RIKHAVCHAND... ... (1900) 25 Bom. 315

———*District Municipal Act* (*Bom. Act II of* 1884), *Sec.* 48—*Suit against Municipality for declaration and injunction—Notice of action.*] The plaintiffs sued the Municipality of Párola to obtain a declaration that a certain building erected by them had been built in accordance with, and not in contravention of, orders issued by the Municipality, and further to obtain an injunction restraining the Municipality from pulling it down. The Municipality contended (*inter alia*) that the suit was not maintainable as no notice of the suit had been given as required by section 48 of the District Municipal Act (Bom. Act II of 1884).

*Held*, that notice was not made an indispensable preliminary to such a suit by section 48 of the Act.

MUNICIPALITY OF PÁROLA *v.* LAKSHMANDÁS ... ... (1900) 25 Bom. 142

———*City of Bombay Municipal Act* (*Bom. Act III of* 1888), *Sec.* 297—*Provision to make public street—Regular line of street.*] In 1888 the Municipal Commissioner of Bombay prescribed the regular line of a certain public street in Bombay, in accordance with the provisions of section 297 of the Municipal Act (Bom. Act III of 1888).

*Held*, that it was not open to the Municipal Commissioner in 1893 to prescribe a different line setting back the line prescribed by his predecessor.

ESSA JACOB *v.* MUNICIPAL COMMISSIONER OF BOMBAY ... (1900) 25 Bom. 107

———*Municipal Act, Bombay City* (*Bombay Act III of* 1888), *Sec.* 527—*Notice of suit when necessary—Refund of town duties—Limitation—Limitation Act* (*XV of* 1877), *Sch. I, Art.* 2.] The plaintiff sued to recover certain town duties which he had paid on importing grain and sugar, but which under section 195 of the City of Bombay Municipal Act (Bom. Act III of 1888) he was entitled to have refunded on exporting them. He had applied for refund in October 1899, but his claim was rejected on the 21st February 1900. The suit was filed on the 21st August 1900.

Section 527 of the City of Bombay Municipal Act (Bom. Act III of 1888) prescribes that one month's notice shall be given of any suit intended to be brought in respect of any act in pursuance or execution or intended execution of the Act, or in respect of neglect or default in the execution of the Act, and article 2 of schedule II of the Limitation Act (XV of 1877) prescribes as the

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period of limitation for such suit ninety days from the date of the Act or omission complained of. Due notice of the suit was therefore given, but the suit brought in pursuance of it was not filed until the 21st August, *i.e.*, six months after the act complained of, *viz.*, the refusal to refund. The defendant admitted the amount claimed and the plaintiff's right to be repaid it, but defended the suit on the ground that he, as Municipal Commissioner, had no authority to discharge a claim which was not legally enforceable, the suit being barred by limitation.

*Held*, (1) that section 527 of the Act did not apply and that no notice to the defendant of this suit was necessary. The defendant could not claim that his conduct had any relation to the execution of the Act if he knowingly and intentionally acted in contravention of its provisions. Here the amount payable by way of refund was ascertained and the plaintiff's right to recover it was admitted and the refusal to refund was a deliberate and conscious contravention of the provisions of the Act. In such a case it could not be held that the money was *bonâ fide* withheld in execution of the Act, and that being so, the defendant was not entitled to notice under section 527.

(2) That the suit was, therefore, not one of the class referred to in article 2, schedule II, of the Limitation Act (XV of 1877), and was not barred.

When it is provided in an Act that notice shall be given to the defendant of any suit intended to be brought in respect of an act done in pursuance or execution or intended execution of the Act or in respect of neglect or default in its execution, such provision does not apply when the action is brought on a contract, for the conduct giving rise to the action is a wrongful act or omission under the contract as distinct from one in the execution of the Act.

RANCHORDÁS *v.* MUNICIPAL COMMISSIONER OF BOMBAY ... (1901) 25 Bom. 387

NOTICE OF ACTION—*Municipality—District Municipal Act (Bom. Act II of 1884), Sec. 48—Suit against Municipality for declaration and injunction.*

*See* MUNICIPALITY ... ... ... ... ... 142

NOTICE OF SUIT WHEN NECESSARY—*Refund of town-duties—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 2—Municipal Act, Bombay City (Bom. Act III of 1888), Sec. 527.*

*See* MUNICIPALITY ... ... ... ... ... 387

PÁRSIS—*Suit for restitution of conjugal rights—Limitation—Limitation Act (XV of 1877), Sec. 23, Sch. II, Art. 35—Pársi Marriage and Divorce Act (XV of 1865)—Husband and wife.*

*See* HUSBAND AND WIFE ... ... ... ... ... 644

PARTIES—*Joinder of—Practice of making a dead man party by his heir—Decree—Rateable distribution under several decrees—Decree must be against some judgment-debtor—Death of judgment-debtor—Subsequent decree against his legal representative and his estate—Civil Procedure Code (XIV of 1882), Sec. 295.*

The practice hitherto prevailing in the mofussil of making a dead man "by his heir" a party to a suit is erroneous and should be discontinued.

GOVIND *v.* MOHONIRÁJ ... ... ... ... (19) 25 Bom. 494

———*Joinder of Parties—Civil Procedure Code (XIV of 1882), Secs. 27, 31, 32 and 34—Practice—Trade mark.*

*See* TRADE MARK ... ... ... ... ... 43

———*Same party cannot be plaintiff and defendant in one suit—Debtor and creditor—Death of plaintiff pending appeal—Defendant becoming plaintiff—Power of Court of Appeal to vary decree on grounds arising subsequently to decree—Partnership accounts—Contract Act (IX of 1872), Sec. 264—Guarantee—*

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*Liability of surety—Right of surety to indemnity—Partnership—Several firms—Common partner—Money lent by partner to his own firm—Practice.*

*See* PRACTICE ... ... ... ... ... 606

PARTITION—*Joint family—Self-acquisition—Burden of proof—Findings of fact—Findings based upon presumptions only—Second Appeal—Practice—Hindu Law.*] In a suit for partition brought in 1898 the plaintiffs claimed a share in the income of a certain Inám village which had been purchased by the defendant in 1873. The defendant pleaded (*a*) that it was his self-acquired property; and (*b*) limitation. The Court of first instance rejected the claim, but in appeal the Judge held that the burden of proving self-acquisition and exclusive enjoyment lay upon the defendant, and that in the absence of such proof the presumption was in favour of the plaintiffs. He therefore reversed the decree and awarded the plaintiffs' claim. On appeal to the High Court,

*Held* (reversing the decree and remanding the case for re-trial) that the burden of proof lay on the plaintiffs. It was for them to show that the purchase had been made out of ancestral funds and they were also bound to prove that they had been in receipt of their share of the income. That burden could not be shifted on to the defendant, who acquired the property and in whose name and possession it had admittedly been for years.

VINÁYAK *v.* DATTO ... ... ... (1900) 25 Bom. 367

PARTNERS—*Practice—Procedure—Civil Procedure Code* (*XIV of* 1882) *Sec.* 153 *—Joint debtors—Suit against several joint debtors—Judgment against one joint debtor who admits claim does not bar suit against others—Contract Act* (*IX of* 1872), *Sec.* 43.

*See* CIVIL PROCEDURE CODE ... ... ... ... 378

PARTNERSHIP—*Several firms—Common partner—Money lent by partner to his own firm—Practice—Parties—Same party cannot be plaintiff and defendant in one suit—Debtor and creditor—Death of plaintiff pending appeal—Defendant becoming plaintiff—Power of Court of appeal to vary decree on grounds arising subsequently to decree—Partnership accounts—Contract Act* (*IX of* 1872), *Sec.* 234—*Guarantee—Liability of surety—Right of surety to indemnity.*] Where an individual is a common partner in two houses of trade, no action can be brought by one house against the other house upon any transaction between them while such individual is a common partner. This doctrine is founded on the rule that the same individual, even in two capacities, cannot be both a plaintiff and defendant to one and the same action.

One partner cannot sue for money lent by him to a firm of which he is a member. The advance is but an item in the partnership account.

It is open to the Court of appeal to vary a decree under appeal, not only for error, but also on grounds which have come into existence since it was passed—*Sakharam* v. *Hari* (1881) 6 Bom. 113.

The plaintiff Purshotamdas Chaturdas and his son Nagindas were members of a joint Hindu family and were the owners of and equally interested in the firm of Gordhandas Bhagwandas. The son Nagindas was also a partner in another firm carrying on business in the name of Pathak Shanghavi and Company. The plaintiff Purshotamdas brought this suit against the latter firm which consisted of four partners, including his son Nagindas (defendant 2), to recover Rs. 61,419-3-1 in respect of advances made by the firm of Gordhandas Bhagwandas to the defendants' firm. The fifth defendant was sued as a surety for one of the partners (defendant 4) in the defendants firm. The lower Court passed a decree for the amount claimed against all the defendants. One of the partners (defendant 4)

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and the surety (defendant 5) appealed. Pending the appeal the plaintiff died and his son Nagindas (defendant 2) became sole owner of the family firm and was substituted for his father on the record, thus becoming both plaintiff and defendant in the suit.

*Held*, (1) that although Nagindas (defendant 2) was partly interested both as creditor and debtor and could not have sued for his share, nevertheless all parties interested being before the Court either as plaintiff or defendants, the Court would adjust and determine their rights in accordance with the rule of justice, equity, and good conscience.

(2) That Purshotamdas and Nagindas being equally interested in the plaintiffs' firm, the lower Court should have made a declaration that they were entitled to the amount advanced in equal shares, and have passed a decree that one moiety thereof should be paid to Purshotamdas and the other moiety treated as an item to the credit of Nagindas in the partnership accounts.

(3) That although on Purshotamdas' death pending the appeal, Nagindas as his heir had become sole plaintiff, the Court of appeal would not pass a decree in his favour even in respect of Purshotamdas' half-share, but would only declare that for this amount also Nagindas was entitled to credit in the partnership accounts. Under the circumstances Nagindas could only get such relief as would have been permissible had he occupied the position of plaintiff at the institution of the suit.

(4) That Nagindas was entitled to credit in the partnership accounts as against those who actually were his partners from time to time. Section 264 of the Contract Act (IX of 1872) only operates in favour of strangers to the partnership.

As to the liability of defendant 5 as surety, the Court *held* on the evidence that defendant 5 had become a surety for the partnership debt. The partners were the principal debtors. But the liability of the surety is co-extensive with that of the principal debtor; therefore no decree could be now passed against defendant 5. Further, Nagindas, now the beneficial owner of the debt was one of the principal debtors, and as such was bound to indemnify his surety and to repay any sum paid under the guarantee. He therefore could not be entitled to any relief against his surety.

RUSTOMJI *v.* SHETH PURSHOTAMDAS ... ... (1901) 25 Bom. 606

PENAL CODE (XLV OF 1860), SECS. 302, 304 AND 325—*Offences triable with the aid of Assessors tried in fact by a jury—Trial by jury—Appeal on a matter of fact—Practice—Procedure—Criminal Procedure Code* (*V. of* 1898), *Secs.* 269 *and* 418.

*See* CRIMINAL PROCEDURE CODE

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——————————SEC. 395—*Previous conviction—Sentence—Whipping Act* (*VI of* 1864 *as amended by Act III of* 1895)), *Sec.* 4—*Whipping—Dacoity.*

*See* WHIPPING ACT

... ... ... ... ... 712

——————————SEC. 499, EXPL. I—*Criminal Procedure Code* (*Act V of* 1898), *Sec.* 4 (*a*), *Chap. XV, Part B, Secs.* 191, 195, 196, 198, 199 *and Sec.* 345—*Defamation of wife—Complaint by husband—Aggrieved party.*] *Held* by the Full Bench (Ranade, J., dissenting) that under the provisions of the Criminal Procedure Code (Act V of 1898) a husband is entitled to be complainant where the alleged offence is defamation, imputing unchastity to his wife.

CHHOTALAL *v.* NATHABHAI ... ... ... (1900) 25 Bom. 151

POSSESSION—*Constructive possession—Obstruction to possession in execution of decree—Construction—Civil Procedure Code* (*XIV of* 1882), *Sec.* 331.

*See* CIVIL PROCEDURE CODE

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POSSESSION—*Declaration of title—Suit by person in possession for declaration of title—Burden of proof—Evidence—Effect of plaintiffs' possession—Presumption of title—Evidence Act (I of 1872), Sec. 110.*] The plaintiffs brought this suit in 1898 for a declaration that certain land in the village of S. belonged to them, and that they might be confirmed in possession. They alleged that they purchased the land in July, 1888, from the pátel of the village, and had been in possession ever since, and that their vendor had previously been in possession. They now sued because their possession had been threatened by the orders of Government officials. It was admitted that the plaintiffs had been in actual possession since 1888.

The District Judge held that the burden of proof of title to the land lay upon the plaintiffs. He was of opinion that they had failed to prove it, and he dismissed the suit.

*Held, per* JENKINS, C. J., and Ranade, J. (WHITWORTH, J., dissenting), that the plaintiffs being in possession (not shown to have wrongfully originated) such possession was good against the whole world except a person who could show better title; that the burden of proving such title lay therefore upon the defendant; that he failed to prove it; and that therefore the plaintiffs were entitled to the declaration sued for.

*Per* WHITWORTH, J.:—That the evidence did not show such possession in the plaintiffs as under section 110 of the Evidence Act (1 of 1872) shifted the burden of proof upon the defendant; that prior to the alleged sale to the plaintiffs in 1888, the defendant had been in the position of an absentee owner of the land in question represented partly by the village officers and partly also by the village community, and that he might be said to be in possession; that the sale to the plaintiffs in 1888 by the pátel of the village, who should have protected the defendant's interests, was a wrongful act; that the plaintiffs were therefore not relieved from the burden of proving their title, and that they had not proved it.

*Per* RANADE, J.:—When a person in possession of land has been dispossessed and sues to recover it, the fact of his previous possession will not entitle him to a decree unless he sues under section 9 of the Specific Relief Act (I of 1877) within six months of the date of dispossession. If he sues after the six months have expired, he must prove a *primâ facie* title. In such a case he is entitled to a decree unless a superior title is proved on the other side. It is in reference to such cases that it has been held that possession is evidence of title, and that the plaintiff, who proves such possession and subsequent disturbance, shifts the burden of proof on to the defendant when the *primâ facie* title is made out. When no such *primâ facie* title is made out by the plaintiff who asks for a declaratory decree, he cannot obtain that decree on the mere ground that he was in possession and the defendant had no title. Mere wrongful possession is insufficient to shift the burden of proof.

HANMANTRAV *v.* SECRETARY OF STATE FOR INDIA ... (1900) 25 Bom. 287

———— ————*Symbolical possession—Auction-purchaser—Suit for possession from judgment-debtor—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 136, 138 and 144.*

*See* LIMITATION ACT ... ... ... ... ... 275

———— ————*Symbolical possession—Effect of symbolical possession as between judgment-creditor or his assigns and judgment-debtor or his heirs—suit by purchaser from judgment-creditor to recover possession from heir of judgment-debtor—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 144.*

*See* LIMITATION ... ... ... ... ... 358

POSSESSORY SUIT—*Mámlatdárs' Courts Act (Bom. Act III of 1876), Sec. 13—Limitation Act (XV of 1877), Sch. II, Art. 47.*

*See* MAMLATDARS' COURTS ACT ... ... ... ... 82

PRACTICE—*Appeal—Joint appellants—Presentation of appeal beyond time—Affidavit excusing delay in appealing made by only one of appellants stating reasons personal to himself—Appeal admitted—Variation of decree on a point affecting other appellants but not the appellant who made the affidavit—Variation not allowed—Civil Procedure Code (XIV of 1882), section 544—Limitation Act (XV of 1877), section 5.*] In a partition suit a decree was passed against twenty-four defendants whose interests in the subject-matter of the suit were not identical. Part of the property in suit consisted of a kulkarni vatan, one-third share of which (*inter alia*) was given by the decree to the plaintiffs. Eleven of the defendants appealed against the decree, of whom only six (defendants 1 to 6) had an interest in the kulkarni vatan. The decree was passed on the 11th April, 1898, and the appeal was not presented until the 7th June, 1898, *i.e.* beyond the period (thirty days) allowed by the Limitation Act (XV of 1877). The only affidavit excusing the delay was made by defendant 14, who was not interested in the kulkarni vatan, and it stated reasons for the delay which were personal to himself, and did not apply to the other appellants. On this affidavit, however, the appeal was admitted, and the lower appellate Court modified the decree and reduced the one-third share of the kulkarni vatan given to the plaintiffs to a one-sixth share. The plaintiffs thereupon appealed to the High Court.

*Held*, (reversing the decree of the lower appellate Court and restoring that of the first Court) that the appellate Court erred in altering the share of the kulkarni vatan. Defendant 14 had no interest in the variation of the decree, having no interest in the kulkarni vatan, and section 544 of the Civil Procedure Code (XIV of 1882) did not apply. The variation was only in favour of defendants 1 to 6, who alone were interested in the vatans. They, however, had not excused their delay in presenting the appeal and it was barred by limitation.

VISHWANATH *v.* VASUDEV ... ... ... (1901) 25 Bom. 699

———*Breach of peace—Magistrate's powers under Sec. 145—Rights of the parties—Criminal Procedure Code (Act V of 1898), Secs. 145 and 526—Transfer of a case—Criminal case—Bias of Judge.*

*See* CRIMINAL PROCEDURE CODE ... ... ... ... 179

———*Criminal Procedure Code (Act V of 1898), Secs. 196 and 235—Sanction to prosecute—Joinder of charges—Trial for more than one offence—Offences falling under two definitions.*] The accused was committed for trial before a Sessions Court on a charge of abetment of dacoity under section 116 of the Indian Penal Code (Act XLV of 1860). In the course of the trial the Assistant Sessions Judge added an alternative charge under section 511 of the Code and sentenced the accused under sections 395, 116 and 511 of the Indian Penal Code (Act XLV of 1890).

In appeal the Sessions Judge held that the evidence disclosed the offence of an attempt to commit the offence of collecting arms, &c., with intention of waging war against the Queen, under section 122, and as no charge under that section could be framed for want of the sanction of Government under section 196 of the Criminal Procedure Code (Act V of 1898), the accused could not be brought to trial at all. He, therefore, reversed the conviction and acquitted the accused.

*Held*, (reversing the order of acquittal), that the mere fact that no charge for the graver offence under section 122 of the Indian Penal Code (Act XLV of 1860) could be framed for want of Government sanction, did not render the trial for the minor offence of attempting or abetting dacoity either irregular or illegal.

*Per* FULTON, J.:—According to the 2nd clause of section 235 of the Criminal Procedure Code (Act V of 1898), if the accused abetted an offence under section 122 of the Penal Code, and by the same speech also attempted or abetted the offence of dacoity, he could be tried for each of these offences; but as that

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section is controlled, as regards the offence against the State, by the provisions of section 196 of the Criminal Procedure Code, its operation in this case is restricted to the minor offence for which the accused could legally be charged and tried.

*Queen-Empress* v. *Karigowda* ((1894), 19 Bom., 51), and *In re Nagarji* ((1894), 19 Bom. 340) distinguished.

QUEEN-EMPRESS *v.* ANANT PURANIK ... ... (1900) 25 Bom. 90

PRACTICE—*Criminal Procedure Code* (*Act V of* 1898), *Secs.* 284, 285 *and* 537—*Trial with assessors—Trial with the aid of one assessor only—Legality of such trial—Assessors.*] In a case triable by a Court of Session with the aid of assessors, one of the assessors being ill, the trial commenced and ended with only one assessor.

*Held*, that there was no legal trial, that the proceedings must be set aside and a new trial directed.

Section 537 of the Criminal Procedure Code (Act V of 1898) had no application to such a case, as the Court was not properly constituted.

KING-EMPEROR *v.* JAYRAM ... ... ... (1901) 25 Bom. 694

———*Criminal Procedure Code* (*Act V of* 1898), *Secs.* 337 *and* 339—*Pardon tendered and accepted—Evidence given and pardon withdrawn by Magistrate—Forfeiture of pardon must be proved—When may forfeiture be declared and pardon withdrawn*] A Committing Magistrate having, under section 337 of the Criminal Procedure Code (V of 1898) tendered a pardon to one of three accused persons, examined him as a witness. Subsequently, however, the Magistrate under section 339 of the Code, withdrew the pardon on the ground that the accused had wilfully concealed a certain fact connected with the offence, and he committed him along with the other accused for trial at the Court of Sessions, where he was found guilty. In giving judgment the Sessions Judge expressed his opinion that the withdrawal of the pardon by the Magistrate was illegal, (1) because such withdrawal could not be made until the close of the trial and should be made by the Court of Sessions, and (2) because the fact, the alleged concealment of which was the ground of the withdrawal, had not been proved. The accused, however, was found guilty and sentenced. On appeal to the High Court—

*Held*, that the conviction and sentence should be set aside on the ground that it had not been proved that the pardon had been forfeited under section 339 of the Criminal Procedure Code (V of 1898). The alleged fact, the concealment of which was the ground for withdrawing the pardon, had not been proved. If the pardon which had been granted had not been forfeited under section 339, it was still in force and the accused should be discharged.

As the law stands the question in such cases is whether the accused has forfeited his pardon by some act of his own. The question is one of fact in which the Magistrate may hold one opinion and the Sessions Judge another, as may happen in the case of any other question of fact in issue in the case. The Sessions Court has to determine for itself on the evidence whether the pardon has been forfeited: for if not, the accused, who has accepted such pardon, cannot be tried.

*Quære*,—Whether the examination at the committal proceedings before the Magistrate of a person who has accepted a pardon satisfies clause 2 of section 337 of the Code which provides that every such person shall be examined as a witness "in the case" or whether such person must be examined as a witness at the "trial."

*Queen-Empress* v. *Bhau* (1898) 23 Bom. 493 doubted.

KING-EMPEROR *v.* BALA ... ... ... (1901) 25 Bom. 675

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PRACTICE—*Criminal Procedure Code* (*Act V of* 1898), *Secs.* 337 *and* 494—*Withdrawal of prosecution—Discharge—Acquittal—Evidence—Discharged persons called as witnesses—Competent witness.*
*See* CRIMINAL PROCEDURE CODE ... ... ... ... 422

———*Decree—Appeal—Stay of execution of decree—Civil Procedure Code* (*Act XIV of* 1882), *Secs.* 545 *and* 546.] In order to obtain a stay of execution of a decree directing the payment of money, the applicant must satisfy the Court on affidavit that substantial loss may result to him unless execution is stayed.
H. H. THE GAIKWAR SIRKAR *v.* GHANDI KATCHARABHAI (1899) 25 Bom. 243

———*Decree—Execution—Stay of execution—Civil Procedure Code* (*Act XIV of* 1882), *Secs.* 545 *and* 546.] An appellate Court cannot pass an order under section 546 of the Civil Procedure Code (Act XIV of 1882) for a stay of execution of a decree under appeal until an order has been made for the execution of the decree.
JANARDAN *v.* NILKANTH ... ... ... (1901) 25 Bom. 583

———*Findings of fact—Finding based upon presumptions only—Second appeal—Hindu Law.*
*See* HINDU LAW ... ... ... ... ... ... 367

———*Parties—Same party cannot be plaintiff and defendant in one suit—Debtor and creditor—Death of plaintiff pending appeal—Defendant becoming plaintiff—Power of Court of appeal to vary decree on grounds arising subsequently to decree—Partnership accounts—Contract Act* (*IX of* 1872), *Sec.* 264—*Guarantee—Liability of surety—Right of surety to indemnity—Partnership—Several firms—Common partner—Money lent by partner to his own firm.*
*See* PARTNERSHIP... ... ... ... ... ... 606

———*Procedure—Civil Procedure Code* (*XIV of* 1882), *Sec.* 153—*Joint debtors—Suit against several joint debtors—Judgment against one joint debtor who admits claim does not bar suit against others—Contract Act* (*IX of* 1872), *Sec.* 43—*Partners.*] In an action against two alleged partners, which came on as a short cause, one of the defendants admitted the claim and judgment was passed against him for the amount claimed. The second defendant denied his partnership with the first defendant and his liability to the plaintiffs, and on his application the case as against him was transferred to the list of long causes and postponed. He then filed a supplemental written statement in which he pleaded that the cause of action alleged in the plaint was joint; that it had become merged in the judgment recovered against the first defendant and that further proceedings in the suit were therefore barred. A preliminary issue on this point was raised and argued.

*Held*, that the suit should proceed. In an action commenced against several joint debtors judgment recovered against one of them who admits the claim does not bar the further prosecution of the suit against the others.
DICK *v.* DHUNJI ... ... ... ... (1901) 25 Bom. 378

———*Procedure—Criminal Procedure Code* (*Act V of* 1898), *Secs.* 269 *and* 418—*Offence triable with the aid of assessors tried in fact by a jury—Trial by jury—Appeal on a matter of fact.*] Under section 418 of the Criminal Procedure Code (V of 1898) no appeal lies on matters of fact where an accused person is convicted by a jury on a charge which ought to have been tried with the aid of assessors.

An accused person was charged with and tried for offences under sections 302, 304 and 325 of the Penal Code (Act XLV of 1860). Under the first of these charges he was triable by a jury. Under the latter two he was triable with the aid of assessors. He was, however, tried for all three offences by a jury who

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found him guilty on the third charge. The Judge accepted the verdict and sentenced the accused to four years' rigorous imprisonment. The accused appealed.

*Held*, (by a full Bench,) that under section 418 an appeal lay in this case on matters of law only and not on matters of fact.

*Per* JENKINS, C. J.—The words in section 418 of the Criminal Procedure Code, 1898, "when the trial was by jury" mean "when the trial in fact was by jury" and not "when the trial should have been by jury."

KING-EMPEROR *v.* PARBHUSHANKAR. ... ... (1901) 25 Bom. 680

PRACTICE—*Procedure—Minor—Suit to recover custody of—Suit by a father for the recovery of his children illegally detained—Tort—Death of defendant pending suit—Survival of course of action against defendant's heirs.*] A Civil Court has jurisdiction to entertain a suit by a father to recover possession of his minor children illegally detained by a stranger. Such a suit is not barred by the provisions of the Guardian and Wards Act (VIII of 1890).

A Mahomedan sought to recover possession of his minor daughters, who were alleged to have been illegally detained by the defendant Mukimbhai. Pending the suit Mukimbhai died, and the suit was continued against his widow Sharifa as his heir and legal representative, on the ground that the minors were in her possession.

*Held*, that the cause of action did not survive as against the widow of the deceased defendant, and that therefore the suit could not proceed. The cause of action which gave rise to the suit was extinguished when the defendant Mukimbhai died.

SHARIFA *v.* MUNEKHAN ... ... ... (1901) 25 Bom. 57

———*Procedure—Reference to High Court—Civil Procedure Code* (*Act XIV of* 1882), *Secs.* 539, 617, 647.] M, claiming to be a trustee or manager of a mosque, applied to the District Judge for permission to grant a lease of lands belonging to the mosque. In response to a proclamation issued, A, the opponent, appeared before the District Judge claiming to be the owner of the village in which the lands were situate and contended that the lands did not belong to the mosque, and that the applicant was not the manager. The District Judge felt a doubt as to whether he had jurisdiction to entertain the application unless a suit was properly framed and filed under section 539 of the Civil Procedure Code (Act XIV of 1882), and referred the point to the High Court under section 617 of the Code.

The High Court refused to answer the reference, being of opinion that no reference under section 617 could be made on such an application. Sections 617 and 647 of the Civil Procedure Code apply when doubts arise in the proceeding of a suit or appeal or execution or other proceeding. Section 617 was not intended to provide for suppositious cases which do not naturally arise in a proper proceeding before the Court.

MAHAMAD HAJI *v.* AHMADBHAI ... ... ... (1900) 25 Bom. 327

———*Procedure—Succession Certificate* (*Act VII of* 1889), *Secs.* 6, 7 *and* 9 *—Summary proceedings—Questions of disputed adoption not to be determined in such proceedings—Security—Guardian's right to certificate on behalf of the minor —Guardian and ward—Minor.*] Questions arising under the Succession Certificate Act (VII of 1889) are to be determined by a summary proceeding, *i.e.* by a short inquiry leading up to and resulting in a rapid decision in contrast with the lengthy investigation which may be required for the more tardy determination of a regular suit. The nature of the inquiry must depend on the circumstances of each case.

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An application by a guardian of a minor is not contemplated by section 6, clause (*d*), of Act VII of 1889, which only permits the petitioner, who claims the right for himself, to apply.

Where on an application for a certificate under the Succession Certificate Act (VII of 1889), section 6, questions of adoption affecting the right to the certificate were raised, which could not be summarily disposed of,

*Held*, that the Judge ought to have decided the *primâ facie* right of the applicant under clause 3 or clause 4 of section 7 of the Act without waiting to decide the issue raised as to the adoption.

GULABCHAND *v.* MOTI CHATRAJI ... ... ... (1900) 25 Bom. 523

PRACTICE—*Trade mark—Rights of importer of goods bearing manufacture's trade mark—Contract by importer for exclusive supply of goods—False statement in a trade mark—Deception—Evidence—Admissibility of judgment of Foreign Court—Evidence Act (I of* 1872), *Sec.* 32, *Cl.* 4, *and Sec.* 42—*Parties—Joinder of parties—Civil Procedure Code (XIV of* 1882), *Secs.* 27, 31, 32 *and* 34.

*See* TRADE-MARK ... ... ... ... ... 433

PRIVY COUNCIL—*Practice—Civil Procedure Code (XIV of* 1882), *Sec.* 600—*Certificate that appeal to the Privy Council involves a question of Law—Malicious prosecution—Question of malice and reasonable and probable cause—Concurrent findings of Lower Courts.*] In an action for malicious prosecution in which the plaintiff claimed Rs. 3,00,000 as damages, the Court of first instance dismissed the suit, holding that the plaintiff had not proved either the existence of malice or the absence of reasonable and probable cause. The plaintiff appealed and the appeal Court dismissed the appeal on the same grounds, and on appeal to the Privy Council their Lordships also held that both as regards malice and the absence of reasonable and probable cause, the plaintiff had failed to discharge the burden of proof which lay upon him.

The case came before the Privy Council on a certificate granted by the High Court of Bombay that the appeal involved a substantial question of law. It appeared to their Lordships of the Privy Council that this certificate must have been granted under a misapprehension. The only question involved was a question of fact on which there were concurrent findings. According to English Law, it is for the Judge and not for the jury to determine what is reasonable and probable cause in an action for malicious prosecution. The jury finds the facts. The Judge draws the proper inference from the findings of the jury. In that sense the question is a question of law. But where the case is tried without a jury there is really nothing but a question of fact and a question of fact to be determined by one and the same person.

PESTONJI M. MODY *v.* QUEEN INSURANCE CO. ... (1900) 25 Bom. 332

PURCHASE MONEY—*Suit by vendee for recovery of—No title in vendor to part of land sold—Compensation—Damages—Limitation—Vendor and purchaser—Limitation Act (XV of* 1877), *Sch. II, Arts.* 62 *and* 67.

*See* LIMITATION ACT ... ... ... ... ... 593

REDEMPTION—*Decree for redemption—Failure of mortgagee to pay the sum ordred by the decree—Rights of mortgagee on such failure—Transfer of Property Act (IV of* 1882), *Secs.* 92 *and* 93—*Mortgage.*

*See* MORTGAGE ... ... ... ... ... 101

REDEMPTION SUIT—*Decree in such suit making no order as to mesne profits—Subsequent suit by plaintiff for surplus mesne profits accrued due prior to former suit—Res Judicata—Civil Procedure Code (XIV of* 1882), *Sec.* 13 *Expl. II and III.*

*See* RES JUDICATA ... ... ... ... ... 115

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REGISTRATION ACT (III OF 1877), SECS. 3, 28, 64 AND 65—*Registration—Registration of a document relating to property situate partly outside British India.*] A document relating to immoveable property which is partly situate within British India and partly outside British India, can be registered, under Act III of 1877, in the district in which a portion of the property is situate.

GOPAL *v.* ANNABHAT ... ... ... ... (1900) 25 Bom. 50

———————SEC. 17—*Insolvency—Property subject to mortgage in possession of insolvent at time of insolvency—Indian Insolvency Act (Stat. 11 and 12 Vict. c, 21), Sec. 23—Reputed ownership—Fixtures—Goods and chattels—Registration of Mortgage.*

*See* INSOLVENCY ... ... ... ... ... 659

REPUTED OWNERSHIP—*Fixtures—Goods and chattels—Registration Act (III of 1877), Sec. 17—Insolvency—Property subject to mortgage in possession of insolvent at date of insolvency—Indian Insolvency Act (Stat. 11 and 12 Vict., c. 21), Sec. 23.*

*See* INSOLVENCY ... ... ... ... ... 659

*RES JUDICATA—Civil Procedure Code (Act XIV of 1882), Sec. 13, Expln. II—Different suits for the same land alleging different titles.*] The plaintiffs sued to recover certain land, alleging that on the death of the widow of the former owner they became entitled as reversioners. They had previously sued the defendant for the same land claiming as the surviving members of the joint family to which the former owner belonged. That suit had been dismissed.

*Held*, that the present suit was barred by the provisions of section 13 of the Civil Procedure Code (Act XIV of 1882).

GUDDAPPA *v.* TIRKAPPA ... ... ... (1900) 25 Bom. 189

———————*Civil Procedure Code, Act (XIV of 1882), Sec. 13, Expl. II—Relief not claimed in former suit.*] A sued B as his agent and trustee in possession of certain lands, complaining that B had been dealing with the lands as if he (B) were the owner, and had mortgaged them to C. C was made a defendant in the suit. B pleaded that he was the owner of the land and not merely agent of A. C also pleaded that B was owner, and he produced the mortgage deed and stated that if he were paid his debt he would not dispute A's claim. The term in C's mortgage deed was one year, at the end of which, if the debt were not paid, C was to be at liberty to enforce his charge. A prayed merely for possession, and no issue was raised or relief asked in respect of C's mortgage. The Court held that B was agent, not owner, and gave A a decree for possession. Subsequently on the expiration of the year allowed in the mortgage deed, C sued A and B to enforce his mortgage, alleging that even though B might not be owner, A had allowed B to deal with the land and to hold himself out as owner, and that thus the mortgage was valid. Both the lower Courts held that the suit was *res-judicata* under explanation II of section 13 of the Civil Procedure Code, on the ground that C's present claim might and ought to have been made a ground of defence in former suit brought by A.

*Held*, reversing the decisions of the lower Courts, that the suit was not barred, as no relief was asked or granted as against C in the former suit, though he was a party to it.

RAMDAS *v.* VAZIRSAHEB ... ... ... (1900) 25 Bom. 589

———————*Civil Procedure Code (Act XIV of 1882), Sec. 13, Expls. II and III—Redemption suit—Decree in such suit making no order as to mesne profits—Subsequent suit by plaintiff for surplus mesne profits accrued due prior to former suit.*] In a redemption suit brought in 1894 the plaintiff prayed for possession of the mortgaged property and for payment of such sum as

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should be found due to him on account of surplus profits received by the defendant. The Court held that the whole mortgage-debt had been paid off in 1883 and awarded possession to the plaintiff, but made no order as to surplus profits. The defendant appealed. The plaintiff did not appeal, nor did he file objections to the decree, which was confirmed by the Appellate Court. In 1897 the plaintiff having obtained possession of the land filed this suit in which (*inter alia*) he claimed to recover mesne profits which had accrued due prior to the former suit.

*Held*, that the claim was *res judicata* and was barred.

KACHU *v.* LAKSHMANSING ... ... ... (1900) 25 Bom. 115

*RES JUDICATA—Co-defendants—Decision in previous suit in which parties were co defendants, when binding—Such decision not binding when one defendant was only a nominal party.*] A judgment in a previous suit is not *res judicata* as between co-defendants so as to bar a subsequent suit brought by one of them, unless there was a conflict of interest between them and the judgment determines the real rights and obligations of the defendants *inter se*.

Such previous judgment is not *res judicata* when the plaintiff in the subsequent suit was only a nominal party in the prior suit.

BALAMBHAT *v.* NARAYANBHAT ... ... ... (1900) 25 Bom. 74

RESTITUTION OF CONJUGAL RIGHTS—*Suit for—Limitation Act* (*XV of* 1877), *Sec.* 23, *Sch. II, Art.* 35—*Parsi Marriage and Divorce Act* (*XV of* 1865)—*Husband and wife—Parsis.*

*See* HUSBAND AND WIFE ... ... ... ... 644

REVERSIONER—*Consent of reversioner to alienation—Subsequent claim by son of consenting reversioner to set aside alienation—Hindu law—Widow—Alienation by widow of land inherited from her husband.*

*See* HINDU LAW ... ... ... ... ... 129

———————*Limitation Act* (*XV of* 1877), *Sch. II, Arts.* 118 *and* 141—*Suit by reversioner for possession of immoveable property—Adoption.*

*See* ADOPTION ... ... ... ... ... 26

RIPARIAN PROPRIETORS—*Obstruction to the flow of water—Injunction—Mámlatdár—Jurisdiction—Mámlatdár Courts' Act* (*Bom. Act III of* 1876), *Sec.* 4—*Natural water-course.*

*See* MÁMLATDA'R ... ... ... ... ... 395

SCHEDULED DISTRICT—*Reference and appeal in a criminal case from the scheduled districts—Act* (*XI of* 1846),—*Scheduled Districts Act* (*XIV of* 1874) *—Jurisdiction.*

*See* JURISDICTION ... ... ... ... ... 667

SECOND APPEAL—*Civil Procedure Code* (*XIV of* 1882), *Sec.* 586—*Practice—Small Cause Court—Jurisdiction of—Question of title—Provincial Small Cause Court Act* (*IX of* 1887), *Sec.* 23—*Claim to possession of land when title to land disputed.*

*See* SMALL CAUSE COURT ... ... ... ... 625

SHIPPING DOCUMENTS—*Letter of credit—Bill of exchange—Meaning of the word "honoured" in reference to a bill of exchange—Right of acceptor of bill to shipping documents.*

*See* LETTER OF CREDIT ... ... ... ... ... 706

SMALL CAUSE COURT—*Jurisdiction of—Question of title—Provincial Small Cause Courts Act* (*IX of* 1877), *Sec.* 23—*Claim to possession of land when title to*

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*land disputed—Second appeal—Civil Procedure Code (XIV of 1882), Sec. 586—Practice.*] The plaintiff sued to recover Rs. 75 as the *utpan* (income) of certain lands. In his defence the defendant raised the question of the title to the land. The plaintiff obtained a decree, which was confirmed in appeal.

*Held*, that the suit, although raising the question of title, was a suit cognizable by a Small Cause Court, and that therefore under section 586 of the Civil Procedure Code (XIV of 1882) no second appeal lay.

VINAYEK *v.* KRISHNARAO ... ... ... (1901) 25 Bom. 625

SMALL CAUSE COURT—*Small Cause Suit—Subordinate Judge invested with Small Cause jurisdiction—Small Cause suit tried by a Subordinate Judge under his ordinary jurisdiction—Appeal—Jurisdiction.*] Where a Subordinate Judge invested with Small Cause jurisdiction tried a small cause suit under his ordinary jurisdiction,

*Held*, that the character of the suit was not altered by the mode in which the Subordinate Judge had exercised his jurisdiction and that his decree being final, was not appeable to the District Court.

SHANKARBHAI *v.* SOMABHAI ... ... ... (1900) 25 Bom. 417

———————*Suit for mesne profits—Nature of suit—Appeal—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Cl. 31—Jurisdiction.*

*See* JURISDICTION ... ... ... ... ... 85

SPECIFIC RELIEF ACT (I OF 1877), SEC. 39, CH. V—*Exercise of Court's discretion—Conduct of plaintiffs—Reasonable apprehension of injury—Coercion—Award—Ground for setting aside an award.*

*See* AWARD ... ... ... ... ... ... 10

STAMP—*Indian Stamp Act (II of 1899), Sch. I, Art. 5 (h)—Agreements to deliver goods in exchange for goods—Price.*] Agreements or memoranda of agreements to deliver goods in exchange for goods are not agreements of sale under article 5, schedule I, of the Indian Stamp Act (II of 1899), and are liable to stamp duty of eight annas each as agreements "not otherwise provided for."

SAMARATMAL *v.* GOVIND ... ... ... (1901) 25 Bom. 696

STAMP ACT (II OF 1899), SCH. I, ART. I—*Acknowledgment—Stamp—Agreement.*] Plaintiff sued upon an acknowledgment passed by the defendant to the following effect:—

"This day rupees two hundred and forty-one I received. The interest thereon is by agreement fixed to be at the rate of Re. three-fourth per cent. per month. This is the account in respect of the same."

The acknowledgment bore an anna stamp.

*Held*, that the above acknowledgment was an agreement and as such required an eight anna stamp.

LAXUMIBAI *v.* GANESH ... ... ... ... (1900) 25 Bom. 373

———————*Arts. 32 and 40—Mortgage—Further charge—Stamp.*] Certain property was mortgaged with possession for Rs. 180 by a deed of mortgage dated 23rd May 1895. The deed was on a stamp paper of Rs. 2 (two).

On 23rd August 1899, the same property was re-mortgaged to the same mortgagee for Rs. 250, made up of Rs. 180, the consideration for the former deed, and another sum of Rs. 70 due to the mortgagee. This second deed was written on a stamp paper of Re. 1.

*Held*, that the second deed was not intended to operate merely as a further charge, but as a new mortgage in which the previous one merged, and that it should therefore be stamped as a mortgage-bond with possession for Rs. 250.

*In re* MEGHA ... ... ... ... (1900) 25 Bom. 370

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STAMP ACT—(II of 1899), Sch. I, Art. 47 (*d*)—*Certificate of membership—Policy of life insurance.*] The certificate of membership of a Provident Society was to the following effect:—

"You have on condition of your conforming to the rules and regulations of this society from time to time in force, insured your life in the class of this society at the age of

"The name of Mr. , residing at , has been registered as that of the person to whom the amount due under the rules of this society after your death should be paid."

*Held*, that the above certificate was a policy of life insurance within the meaning of article 47 (*d*) of Act II of 1899, and as such liable to pay *ad valorem* duty.

*In re* HIMAT PROVIDENT SOCIETY ... ... ... (1900) 25 Bom. 376

STOLEN PROPERTY—*Disposal of stolen property on conviction of the thief—Bâbashai coin—Legal tender—Customary coin—Criminal Procedure Code (Act V of 1898), Sec. 517.*

*See* CRIMINAL PROCEDURE CODE ... ... ... ... 702

STREET—*Public street lighted and swept by Municipality—Municipality—District Municipal Act (Bom. Act VI of 1873), Secs. 17, 48 and 64.*

*See* MUNICIPALITY ... ... ... ... ... 315

———*Regular line of—Municipality—City of Bombay Municipal Act (Bom. Act III of 1888), Sec. 297—Provision to make public street.*

*See* MUNICIPALITY ... ... ... ... ... 107

SUCCESSION CERTIFICATE ACT (VII OF 1889), *Secs. 6, 7 and 9—Summary proceedings—Questions of disputed adoption not to be determined in such proceedings—Security—Guardian's right to certificate on behalf of the minor—Guardian and Ward—Minor—Practice—Procedure.*] Questions arising under the Succession Certificate Act (VII of 1889) are to be determined by a summary proceeding, *i.e.* by a short inquiry leading up to and resulting in a rapid decision in contrast with the lengthy investigation which may be required for the more tardy determination of a regular suit. The nature of the inquiry must depend on the circumstances of each case.

An application by a guardian of a minor is not contemplated by section 6, clause (*d*), of Act VII of 1889, which only permits the petitioner, who claims the right for himself, to apply.

Where on an application for a certificate under the Succession Certificate Act (VII of 1889), section 6, questions of adoption affecting the right to the certificate were raised, which could not be summarily disposed of.

*Held*, that the Judge ought to have decided the *primâ facie* right of the applicant under clause 3 or clause 4 of section 7 of the Act without waiting to decide the issue raised as to the adoption.

GULABCHAND *v.* MOTI CHATRAJ ... ... ... (1900) 25 Bom. 523

SUMMARY PROCEEDINGS—*Practice—Procedure—Succession Certificate Act (VII of 1889), Secs. 6, 7 and 9—Questions of disputed adoption not to be determined in such proceedings—Security—Guardian's right to certificate on behalf of minor—Guardian and Ward—Minor.*

*See* PRACTICE; SUCCESSION CERTIFICATE ACT ... ... ... 523

SURETY—*Liability, mode of enforcing—Civil Procedure Code (XIV of 1882), Secs. 545 and 546.*] The mode of enforcing payment by a surety who has rendered himself liable under section 545 (*c*) or section 546 of the Civil Procedure Code (Act

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XIV of 1882) is by a summary process in execution and not by means of a separate suit.

JAMSEDJI *v.* BAWABHAI ... ... ... (1900) 25 Bom. 409

TENANTS-IN-COMMON, RIGHTS OF AGAINST EACH OTHER—*Trespass—Exclusion from common property.*] Laying a drain in land and the incidental temporary interference with the soil necessary for that purpose cannot be regarded as an ouster or destruction or an act of waste, and will not entitle a tenant-in-common of the land to maintain an action against another tenant-in-common.

MOHANCHAND *v.* ISAKBHAI ... ... ... (1900) 25 Bom. 248

TORT—*Death of defendant pending suit—Survival of cause of action against defendants' heirs—Practice—Procedure.*

*See* PRACTICE ... ... ... ... ... 574

TRADE-MARK—*Rights of importer of goods bearing manufacturer's or producer's trade-mark—Contract by importer for exclusive supply of goods—False statement in a trade-mark—Deception—Evidence—Admissibility of judgment of Foreign Court—Evidence Act (I of 1872), Sec. 32, Cl. 4, and Sec. 42—Parties—Joiner of parties—Civil Procedure Code (XIV of 1882), secs. 27, 31, 32 and 34—Practice.*] The plaintiff sued to restrain the defendants from importing into or selling in Bombay or other parts of India watches similar in appearance to a certain class of watches imported and sold by the plaintiff and bearing a trade-mark so similar to the trade-mark on the watches imported by plaintiff that it was calculated to deceive purchasers into the belief that such watches were watches imported and sold by the plaintiff. It was proved that the trade-mark on the watches so imported by the plaintiff was not the trade mark of the plaintiff but that of the manufacturer in Switzerland, and that the plaintiff was merely an importer and seller of the watches under a contract for exclusive supply in India.

*Held*, that the plaintiff was not entitled to an injunction. An importer can only protect a trade-mark representing his own reputation and the advantage accruing therefrom, but not the trade-mark of another, a manufacturer or producer. It was necessary for the plaintiff to show that the value of the trade which he carried on was due to the reputation acquired by and attaching to the trade-mark as a guarantee of importation by him and not merely as a guarantee of manufacture by somebody else and that therefore the imitation of that trade-mark was an infringement of an exclusive right of his own entitling him to ask for protection. This the plaintiff had failed to do.

It was contended by the defendants that in no case was the plaintiff entitled to relief, inasmuch as by using the words "Roskopf Patent" in the trade-mark for which he claimed protection he was guilty of deception, the fact being that there was no patent in existence for the watches which bore this trade-mark. A certified copy of the judgment of a Swiss Court against one Ferdinand Schmidt on this point was tendered in evidence.

*Held*, that the issue as to the use of the word 'Patent' could not be decided in this case if the trade-mark in question was not the plaintiffs, as the Court could not in this suit decide whether Messrs. Schmidt and Company were or were not precluded from using the word 'Patent' on Roskopf watches manufactured by them. No decision on the point could have effect in a case to which Messrs. Schmidt had not been made a party.

*Held*, also, that the judgment tendered was not admissible in evidence.

An application was made on behalf of the plaintiff to add the manufacturer as co-plaintiff in the suit.

*Held*, that the application should be refused. The plaintiff's case was wholly different from that of the manufacturer. The plaintiff's case was that the

defendants had infringed his trade-mark as importer, the exclusive right to which in India had been established. The manufacturer's claim would raise questions as to his rights to adopt and protect it in the country of its origin and consequently in all possible markets in which it might be introduced. Sections 27, 31 and 32 of the Civil Procedure Code (XIV of 1882) did not apply.

HEINIGER *v.* DROZ ... ... ... (1900) 25 Bom. 133

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 53—13 *Eliz., Cap.* 5, *and* 27 *Eliz., Cap.* 4—*Fraudulent conveyance—Sale by debtor in order to defeat an execution—Intent to defeat or delay creditors.*] Bhagwant filed a suit against Ganpati, the manager of a Hindu undivided family, to recover a sum of money due to him, and on the same day obtained an order for attachment before judgment of certain property belonging to the defendant and his family. Before the attachment was actually effected, the property in question and other property was sold to Kedari (defendant No. 1). The deed of conveyance was executed on the day the suit was filed, and the order for attachment was made and notice of the order for attachment was given both to the vendor and the purchaser before the deed was registered, but before the attachment was actually effected.

Subsequently the plaintiff obtained a money decree in his suit and then filed this suit against the vendor and purchaser, praying for a declaration that the conveyance was fraudulent and void, and that the property was liable to attachment in execution of his decree.

The lower Courts dismissed the suit, holding that the sale to the vendee was valid although made with the object of defeating the anticipated attachment of the plaintiff. On appeal to the High Court,

*Held,* (confirming the decree) that clause 2 of section 53 of the Transfer of Property Act (IV of 1882) did not apply, as it was not found that the transfer in question was made fraudulently or for a grossly inadequate consideration.

*Held,* also, that although the object of the transfer was to defeat an anticipated execution, that did not show that the intent was to defeat or delay the creditors so as to render clause 1 of section 53 applicable. Such intent would probably be inferred if there was such an inadequacy of consideration as to bring the case within clause 2 of section 53.

Clause 3 of the section only comes into operation when the facts justify the application of clause 1 or clause 2.

BHAGWANT *v.* KEDARI ... ... ... (1900) 25 Bom. 202

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 89—*Civil Procedure Code (Act XIV of* 1882), *Sec.* 310*A*, *as amended by Act V of* 1894—*Sale in execution of mortgage decree.*] The provisions of section 310A of the Civil Procedure Code (Act XIV of 1882) as amended by Act V of 1894 are applicable to sales held in execution of mortgage decrees passed under the Transfer of Property Act (IV of 1882).

Sections 304 to 319 of the Code of Civil Procedure apply to all sales of immoveable property.

KRISHNAJI *v.* MAHADEV ... ... ... (1900) 25 Bom. 10

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SECS. 92 AND 93—*Mortgage—Redemption—Decree for redemption—Failure of mortgagor to pay the sum ordered by the decree—Rights of mortgagee on such failure.*] In a suit by a mortgagor for redemption of a mortgage dated 17th March, 1891, a decree was passed in 1897 allowing him to redeem on payment of the mortgage-debt within a year from the date of the decree; but the decree did not contain any provision for foreclosure or sale in default of payment on the due date.

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The plaintiff having made default, the defendant applied to the Court for an order absolute for foreclosure or sale, under section 93 of the Transfer of Property Act (IV of 1882). His application was rejected on the ground that as the decree did not contain any clause for foreclosure or sale, section 93 of the Act was not applicable.

*Held*, in second appeal, that the defendant (mortgagee) was entitled to the remedy given by section 93 although the decree was not drawn up as prescribed by section 92. The omission of the Court to draw up the proper decree under section 92 did not deprive the mortgee of the relief provided by section 93.

MURLIDHAR *v.* PARSHARAM ... ... ... (1900) 25 Bom. 101

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 99—*Agreement to pay a debt partly in cash and to secure balance by mortgage or in default to execute a mortgage for whole amount—Failure to pay part in cash—Decree for such part—Second suit to enforce giving of mortgage for balance barred—Civil Procedure Code (Act XIV of 1882), Sec.* 43.

*See* CIVIL PROCEDURE CODE ... ... ... ... 161

TRANSFER OF PROPERTY ACT (IV OF 1882), SEC. 108, CL. (*c*)—*Landlord and tenant—Lease—Ouster of tenant by paramount owner—Claim by tenant against his lessor for compensation for such ouster—Covenant for quiet enjoyment—Damages—Measure of damages.*] The words "without interruption" in section 108, clause (*c*), of the Transfer of Property Act (IV of 1882) give a lessee in India the same rights as he would have under what is known in England as a covenant for quiet enjoyment in an unqualified form. In other words, the lessee is protected against interruption by whomsoever it is occasioned.

Where the interruption is caused by the paramount owner of the property, and not by a stranger, the lessor is bound to remove the interruption, and if he fails to do so, he must indemnify the lessee.

A held land under a lease granted by B for eleven years. B had no title to the land, which really belonged to C. In 1895 C dispossessed A.

*Held*, that under clause (*c*) of section 108 of the Transfer of Property Act (IV of 1882) A was entitled to recover compensation from B.

TAYAWA *v.* GURSHIDAPPA ... ... ... (1900) 25 Bom. 269

TRESPASS—*Exclusion from common property—Tenants-in-common—Rights of against each other.*

*See* TENANTS-IN-COMMON ... ... ... ... 248

UNDUE INFLUENCE—*Sale—Inadequacy of consideration—Contract—Voidable contract—Contract (Act IX of* 1872), *Sec.* 16.] Inadequacy of consideration in conjunction with the circumstances of the indebtedness and ignorance of the vendor are facts from which a Court may infer the exercise of undue influence.

BHIMBHAT *v.* YESHWANTRAO ... ... (1900) 25 Bom. 126

VATAN—*Bombay Act III of* 1874, *Sec.* 18—*Suit for a declaration of right to a share in a vatan, and to participate in the emoluments of the vatan—Jurisdiction of the Civil Court to entertain such suit—Jurisdiction.*] Where the plaintiffs sued to obtain a declaration that they were entitled to a third share in a Mahárki vatan and to participate in the profits of the vatan,

*Held*, that under section 18 of Bombay Act III of 1874, the Civil Court had no jurisdiction to make the declaration sought.

*Parsha* v. *Lagmya* ((1888) 13 Bom., 83) followed.

BHIVA *v.* VITHYA ... ... ... ... (1900) 25 Bom. 186

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VATAN—*Vatan in Guzerat—Service commutation settlement—Inheritance—Succession to a vatan—Succession through females—Bombay Act III of* 1874, *Sec.* 5, *as amended by Secs.* 1 *and* 2 *of Bombay Act V of* 1886—*Alienation of vatan.*] A *vatan* in Guzerat does not cease to be *vatan* property as defined by section 4 of Bombay Act III of 1874, merely because a service commutation settlement has been effected. Such a settlement does not change the nature of the property simply because service is not demanded.

As far as the power of alienation is concerned, if it is granted by the settlement, it cannot be taken away by the change introduced in section 5 of Bombay Act III of 1874 by section 1 of Bombay Act V of 1886.

Section 2 of Act V of 1886 (which amends section 5 of Act III of 1874) gives a preference to male members of the vatan family over persons claiming through females

*Held*, that the section applies to vatans in Guzerat, even though the services originally appertaining to such vatan had ceased to be demanded.

One Niamatrai was a *vatandâr* in Guzerat. He died in 1844, leaving behind him a widow, a daughter, and a separated brother. His property consisted of certain *pasaita* lands and a cash allowence attached to his *vatan*. In 1868 Government effected a service settlement with the *vatandâr* by which the *vatan* property was continued to *Niamatrai's* heirs, free from all liability to render any services in connection with the *vatan*. In 1889 Niamatrai's widow died, her daughter having predeceased her. Thereupon plaintiffs, who were the sons of *Niamatrai's* daughter, sued to establish their title as heirs to the *vatan* property as against the defendants who were the son's sons of Niamatrai's separated brother.

*Held*, that under section 2 of Bombay Act V of 1886, plaintiffs, as claiming through a female, were not entitled to succeed to Niamatrai's *vatan* property in preference to the defendants who were male members of the deceased *vatandâr's* family.

BAI JADAV *v.* NARSILAL ... ... ... (1900) 25 Bom. 470

VENDOR AND PURCHASER—*Estoppel—Evidence Act* (*I of* 187?), *Sec.* 115—*Land Revenue in Bombay—Assessment—Enhancement of assessment—Bombay Act II of* 1876—*Sale of land by Government to its purchaser assessed at a certain rate—Subsequent enhancement.*

*See* LAND REVENUE ... ... ... ... ... 714

———*Estoppel—Land Revenue in Bombay—Assessment—Enhancement of assessment—Bombay Act II of* 1876—*Purchase of land from Government—Encroachment—Acquisition of land under section* 26 *of Bombay Act II of* 1876.

*See* LAND REVENUE ... ... ... ... ... 752

———*No title in vendor to part of land sold—Failure to give possession to vendee—Suit by vendee for refund of purchase-money—Compensation—Damages—Limitation—Limitation Act* (*XV of* 1877), *Arts.* 62 *and* 97—*Contract—Failure of consideration.*] On the 25th of August, 1891, A sold certain property consisting of 42 separate plots of land to the plaintiff by a sale-deed, which contained the usual convenant for quiet enjoyment. The plaintiff obtained possession of thirty-six of the plots but not of the remaining six. The occupants of these latter had been in possession for many years and claimed to be owners of them. On 6th September, 1897, the plaintiff brought this suit for possession against A and the occupant of one of the six plots and in the alternative he claimed compensation from A. Both the lower Courts found that A's title to the plot in question had been extinguished at the date of the conveyance to the plaintiff in 1891 and they held that the plaintiff's claim for compensation

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was barred by limitation under Article 62 of Schedule II of the Limitation Act (XV of 1877). On second appeal it was contended that the plaintiff's right to compensation arose only when the lower Court decided that he could not obtain possession of the land and that consequently his claim fell within Article 97 of the Limitation Act and was not barred,

*Held,* (Whitworth J. dissenting) that Article 62 applied and that the plaintiff's claim for compensation was therefore barred. As A (the plaintiff's vendor) had no title to the land at the date of conveyance the contract of sale was void *ab initio*: there was then a failure of consideration and the plaintiff's cause of action for compensation arose on that date.

ARDESIR *v.* VAJESING ... ... ... (1901) 25 Bom. 593

VENDOR AND PURCHASER—*Sale—Inadequacy of consideration—Contract—Voidable contract—Contract Act (IX of 1872), Sec. 16—Undue influence.*

*See* UNDUE INFLUENCE ... ... ... ... ... 126

WHIPPING ACT (VI OF 1864 AS AMENDED BY ACT III 1895), SEC. 4—*Whipping—Dacoity—Penal Code (Act XLV of 1860), Sec. 395—Previous conviction—Sentence.*] Under section 4 of the Whipping Act, as amended in 1895, a sentence of whipping in addition to imprisonment is not legal in the case of a conviction of dacoity which was committed prior to the previous conviction of similar offence.

*Reg.* v. *Surya* (1866) 3 B.H. C.R., 38 (Cr.) and *Reg.* v. *Kusa* (1870) 7 B.H. C.R., 70 (Cr.) followed.

KING-EMPEROR *v.* BABYA BHIVA ... ... (1901) 25 Bom. 712

WIDOW—*Alienation by widow of land inherited from her husband—Reversioner—Consent of reversioner to alienation—Subsequent claim by son of consenting reversioner to set aside alienation—Hindu law.*] One Govind Bhagwant died, leaving him surviving a widow Radhabai, a sister Bhimabai and her son Venkatesh. Radhabai alienated to the defendant five plots of land inherited by her from her deceased husband. Two of them (Nos. 495 and 496) were sold with the consent of Venkatesh to defray the expenses of his marriage. Their sale-proceeds were received by Venkatesh and the sale-deed was attested by him. The other three plots (Nos. 497, 498 and 499) were relinquished by Radhabai in favour of the defendants, as she was unable to pay Government assessment. The plaintiff was the son of Venkatesh and was born after these transactions. After the sale and relinquishment in favour of the defendants, Bhimabai died, then Venkatesh, and in 1889 Radhabai died. In 1897 the plaintiff brought the present suit as reversionary heir of Govind Bhagwant against the defendant to recover possession of the five plots of land alienated to him by Radhabai.

*Held,* that the sale of the two plots Nos. 495 and 496 by Radhabai to the defendant was good, and the plaintiff was not entitled to recover them. The consent given by Venkatesh, the plaintiff's father who was at the time the only male reversioner in existence, validated the sale.

As to the remaining three plots (Nos. 497, 498 and 499) the plaintiff was entitled to recover them. There was no consent given, or legal necessity for their alienation proved.

VINAYAK *v.* GOVIND ... ... ... (1900) 25 Bom. 129

WILL—*Construction—Executor—Suit by legatee against executor for arrears of rent—Limitation.*] A Hindu died leaving a son, a daughter, a widow and a brother's widow. He left a will whereby he directed that the two widows should receive "half and half" the annual income realized from the four houses which he specified and that on the death of one of them the survivor should take the whole for her life. The son was to make repairs and to pay the municipal taxes payable in respect of the said houses, but he was to have "no manner of right whatever to the income" thereof. He was also to provide the widows with food and clothing for their life and to provide the expenses of the marriage of the testator's daughter.

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Except as above mentioned the whole of the testator's property, moveable and immoveable, was left to the son. The plaintiff (one of the widows) sued to recover the rent of the four houses which had accrued since the testator's death. It was contented that by the will the four houses were given to the widows.

*Held*, that the son was the sole owner of the whole property. The will, however, had imposed upon him the duties of an executor and he should be treated as such. There was thus a fiduciary relation established between him and the widows and they were entitled to the arrears of rent for the whole period claimed.

RAMDHAN *v.* MANIBAI ... ... ... (1900) 25 Bom. 429

WITNESS—*Discharged persons called as witnesses—Competent witness—Practice—Criminal Procedure Code (Act V of 1898), Sec. 337 and 494—Withdrawal of prosecution—Discharge—Acquittal—Evidence.*

*See* CRIMINAL PROCEDURE CODE ... ... ... ... 422

WORDS AND PHRASES—"*Costs in the cause*", *meaning of*—

*See* COSTS ... ... ... ... ... ... 230

——————"*Criminal case*"—

*See* CRIMINIAL PROCEDURE CODE ... ... ... ... 179

——————"*Honoured.*"

*See* LETTER OF CREDIT ... ... ... ... ... 706

——————"*In the case*", *meaning of*—

*See* CRIMINAL PROCEDURE CODE ... ... ... ... 675

——————"~~*Possession.*~~"

*See* CIVIL PROCEDURE CODE ... ... ... ... 478

——————"*Reclaim*—

*See* LANDLORD AND TENANT ... ... ... ... 32

——————"*Rent.*"

*See* ASSESSMENT ... ... ... ... ... 556

——————"*When the trial was by jury*", *meaning of*—

*See* CRIMINAL PROCEDURE CODE ... ... ... ... 680

——————"*Without interruption*—

*See* TRANSFER OF PROPERTY ACT ... ... ... ... 269